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PROCEEDINGS AND ORDERS

DATE: [07/09/93]

CASE NBR: [92101213] CFX

STATUS: [DECIDED]

SHORT TITLE: [VMI, et al.]

VERSUS [United States]

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EXIT

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

VIRGINIA MILITARY INSTITUTE, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

**Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

RICHARD K. WILLARD
Counsel of Record
DAVID A. PRICE
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

GRIFFIN B. BELL
WILLIAM A. CLINEBURG, JR.
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303

ROBERT H. PATTERSON, JR.
WILLIAM G. BROADDUS
ANNE MARIE WHITEMORE
FRANK B. ATKINSON
MC GUIRE, WOODS, BATTLE
& BOOTHE
One James Center
Richmond, Virginia 23219
*Counsel for Virginia Military
Institute, Its Board of Visitors
and Superintendent, VMI
Foundation, Inc., and the VMI
Alumni Association*

QUESTION PRESENTED

When the admissions policy of a state-supported single-sex college is substantially related to the achievement of important educational objectives, is the policy nevertheless unconstitutional if the state fails to provide an identical program for members of the other sex?

PARTIES TO THE ACTION

Plaintiff

United States of America

Defendants

1. Commonwealth of Virginia
2. Lawrence Douglas Wilder, Governor of the Commonwealth of Virginia
3. Virginia Military Institute ("VMI")
4. Joseph M. Spivey, III, President of the VMI Board of Visitors
5. John Williams Knapp, Superintendent of VMI
6. The Board of Visitors of VMI
- 7-21. Thomas N. Downing; Elizabeth P. Hoisington, Brig. Gen.; Robert Q. Marston; A. Courtland Spotts, III; Daniel F. Flowers; B. Powell Harrison, Jr.; Robert H. Spilman; Samuel E. Woolwine; James W. Enochs, Jr.; William A. Hazel; Harvey S. Sadow; Douglas K. Baumgartner; Daniel D. Cameron; Glen N. Jones; John W. Roberts, Members of the Board of Visitors of VMI

Intervenors

1. VMI Foundation, Incorporated
2. VMI Alumni Association

There are no parent companies or non-wholly-owned subsidiaries to be listed pursuant to Rule 29.1.

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IN THE
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OCTOBER TERM, 1992

 No. _____

VIRGINIA MILITARY INSTITUTE, *et al.*,
Petitioners,
 v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the
 United States Court of Appeals
 for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, dated October 5, 1992, is published at 976 F.2d 890 and is reproduced at pages 1a-22a of the appendix to this petition ("Pet. App."). The order of the court of appeals denying rehearing and rehearing *in banc* is not yet reported, but is reproduced at Pet. App. 102a-104a. The order of the United States District Court for the Western District of Virginia, dated June 14, 1991, is reproduced at Pet. App. 23a. The opinion of the district court is reported at 766 F. Supp. 1407 and is reproduced at Pet. App. 24a-40a. The appendix to the district court's opinion, setting out the court's findings of fact, is reproduced at Pet. App. 41a-104a.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was issued on October 5, 1992. An order denying petitioner's timely request for rehearing and rehearing *in banc* was entered on November 17, 1992.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

This case also involves Va. Code §§ 23-92 and 23-104, which are reproduced at Pet. App. 105a.

STATEMENT OF THE CASE

Petitioner Virginia Military Institute ("VMI") of Lexington, Virginia is a state-supported undergraduate institution that employs a unique and successful education and training program to develop character, self-discipline and motivation in young men. VMI enrolls approximately 1,300 of the 160,000 students who attend Virginia's fifteen state-supported four-year colleges. Pet. App. 49a. Although the other state-supported colleges in Virginia are now coeducational, VMI admits only males. This petition seeks review of the Fourth Circuit's decision holding that VMI's admissions policy violates the Equal Protection Clause of the Fourteenth Amendment because the Commonwealth of Virginia does not operate a VMI-type institution for women.

The District Court's Decision and Findings of Fact

Pursuant to Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, the United States instituted this

action on March 1, 1990, seeking admission of women to VMI.¹ During a six-day trial beginning on April 4, 1991, the Honorable Jackson L. Kiser heard testimony from six expert and eleven fact witnesses, and received more than 300 exhibits. Pet. App. 26a, 43a-48a. Among the experts testifying on the educational value of VMI's system and the anticipated impact of coeducation were Dr. David Riesman, a professor of sociology at Harvard University, and Dr. Richard Richardson, a higher education expert who has chaired approximately 25 university accreditation evaluation committees, including the committee that re-accredited the United States Military Academy at West Point in 1989. Pet. App. 44a-45a.

Guided by this Court's decision in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), the district court sought to determine whether "the discrimination serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." Pet. App. 30a (quoting *Hogan*, 458 U.S. at 730). In accordance with *Hogan*, the district court undertook "a fact-intensive examination of the practical considerations underlying the challenged policy." Pet. App. 31a. Following the trial, the district court found for VMI. The court stated:

The record is replete with testimony that single gender education at the undergraduate level is beneficial to both males and females. Moreover, the evidence establishes that key elements of the adversative VMI educational system, with its focus on barracks life, would be fundamentally altered, and the distinctive ends of the program would be thwarted, if VMI were forced to admit females and to make changes necessary to accommodate their needs and interests.

Id. at 31a-32a.

¹ The Government based the action solely on the Fourteenth Amendment. It could not and did not bring suit under Title IX of the Civil Rights Act of 1964, 20 U.S.C. § 1681, because this title excludes historically single-sex public schools. 20 U.S.C. § 1681 (a)(5).

The "adversative" system to which the court referred is an approach to education that seeks to motivate students and develop character through rigorous control of their day-to-day life inside and outside the classroom. As education experts for both sides in this case testified at trial, the adversative model is tailored to the developmental characteristics of adolescent males. Pet. App. 82a-83a.

Since its founding in 1839, VMI has employed adversative methods to develop character in young men. Pet. App. 66a-67a. Unlike the federal military academies, VMI does not seek primarily to prepare cadets for careers in the armed forces. Pet. App. 67a, 78a.² Although numerous VMI alumni have served with distinction in the armed forces, VMI's use of military-type regulations, etiquette, drilling, and discipline has always been a means to the end of developing character and self-discipline in its students. Pet. App. 61a, 67a.

As the district court described, "Physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values are the salient attributes of the VMI educational experience." Pet. App. 54a. First-year cadets, known as "rats"—so named because the rat is said to be the lowest animal on Earth—are subjected to an extreme form of the adversative model known as the "rat line." Pet. App. 56a. The court found that in terms of physical rigor, the rat line is more demanding than Army basic training and is comparable to Marine Corps boot camp. *Id.*

VMI's adversative program is centered on life in the barracks, where all students are required to live during

² Approximately 18% of VMI alumni have chosen military careers. See *Virginia Military Institute 1990-91 Catalogue*, VMI Exhibit 11, at 7.

the academic year. Pet. App. 59a.³ The barracks is a four-story building, with each class housed on a single floor. The average occupancy rate of rooms in the VMI barracks is between three and four cadets per room. Pet. App. 60a. To permit constant scrutiny of cadets by their fellow cadets, the layout of the barracks deprives residents of all privacy. *Id.* The district court found that the barracks provides a "total training environment," in which are conducted many activities that are integral to the VMI program. Pet. App. 59a.

In 1983, after this Court's decision in *Hogan*, and amid the movement of many single-sex institutions to coeducation, the VMI Board of Visitors appointed a Mission Study Committee to reexamine both VMI's institutional mission and the relationship of the single-sex admission policy to that mission.⁴ Pet. App. 68a-69a. The Committee was comprised of three VMI alumni and four non-alumni, male and female, including the president of a private women's college. Pet. App. 69a. Following a three-year study, the committee concluded that VMI should retain its policy of limiting admission to males. After examining the effect of coeducation on the U.S. military service academies and other educational institutions, the committee determined that coeducation would inevitably

³ VMI operates a summer session, separately administered, which is not based on an adversative model and does not have the military-type features of the regular program. Summer students need not be VMI cadets and include both males and females. Summer students are not subject to military-type training and are not required to live in the barracks. Pet. App. 62a-63a.

VMI also operates a small, non-military evening program that cadets are not permitted to attend. Cadets and evening students do not participate in any joint activities, and evening students do not live in the barracks. Pet. App. 63a.

⁴ The VMI Board of Visitors has authority under Virginia law to determine VMI's admission policy, subject to the ultimate control of the Virginia General Assembly. Va. Code §§ 23.92, 23-104 (reproduced at Pet. App. 105a).

require VMI to move away from the adversative model. Pet. App. 72a-74a.⁶

After reviewing the record, the district court concluded that VMI's single-sex admission policy is a product of "reasoned analysis" within the meaning of this Court's decision in *Hogan*, and does not reflect stereotyped thinking. Pet. App. 35a, 36a & n.9. Based on the unrebutted expert testimony and scholarly literature in the record, the court found that a "substantial body of 'exceedingly persuasive' evidence supports VMI's contention that some students, both male and female, benefit from attending a single-sex college." Pet. App. 33a. The district court further found that the adversative model of education employed at VMI is beneficial to adolescent males, but ill-suited to the developmental characteristics of adolescent females. Pet. App. 36a, 82a-85a.

The court also found that the admission of women would substantially change the VMI program by, *inter alia*, creating distinct groups of cadets subject to different treatment with respect to privacy, physical training, housing, and other areas, in violation of the VMI principle of complete equality of treatment, Pet. App. 90a, 94a-95a. Accordingly, the district court held that VMI's admissions policy was substantially related to the important objectives of providing educational benefits that would substantially diminish if the school were required to admit women, and of increasing the diversity of the Virginia system of education. Pet. App. 33a-37a.

⁶ When Congress enacted legislation requiring the service academies to admit women, it directed the academies to adjust their programs as needed to reflect physiological differences between the sexes; accordingly, West Point has substantially altered the physical component of its program. Pet. App. 92a-93a. The district court found that similar changes would be necessary at VMI if it became coeducational. Pet. App. 94a. West Point, unlike VMI, has also moved its overall education and training system away from the adversative model. Pet. App. 96a-98a.

Having concluded that VMI's admission policy is justified by its educational mission and method, the district court deemed it unnecessary in this case to determine the adequacy of corresponding single-sex educational opportunities for women.⁶ Noting that here, as in *Hogan*, the plaintiff seeks the admission of women to a particular educational program rather than creation of a corresponding single-sex program for the other gender, the district court stated that it was obliged under *Hogan* to "tailor its decision to the relief sought." Pet. App. 39a. "Thus, whether Virginia can continue to rely upon private colleges to supply single-gender education to females or whether it must operate a state-supported, all-female college is not an issue to be resolved in this lawsuit." *Id.*

The Court of Appeals' Decision

On appeal, the United States Court of Appeals for the Fourth Circuit reversed.⁷ The court of appeals, like the district court, rejected the allegation that VMI's policy is based on stereotypes. Pet. App. 15a. The appeals court also affirmed the district court's key findings of fact,

⁶ However, the district court did find that Virginia "relies on its independent institutions to offer students choices and meet the educational needs of people in the Commonwealth." Pet. App. 53a. There are five private all-women's colleges in Virginia with a total enrollment of 3,850: Randolph-Macon Women's College, Mary Baldwin College, Sweet Briar College, Hollins College, and Southern Seminary College (a two-year school). There is one private men's college, Hampden-Sydney College, with an enrollment of 944. Pet. App. 51a-52a. The district court found that the larger number and enrollment in independent women's colleges in Virginia "indicates that the private sector is providing for that form of education to a much greater extent than it provides for all-male education." Pet. App. 52a. Virginia provides tuition assistance grants to Virginians enrolled in private colleges in the state. Pet. App. 53a.

⁷ The opinion was authored by the Honorable Paul V. Niemeyer and joined by Circuit Judge James Dickson Phillips, Jr. and by Senior District Judge Hiram H. Ward (sitting by designation). Appellate jurisdiction was based on 28 U.S.C. § 1291.

including the finding that VMI's "institutional mission justifies a single-sex program," Pet. App. 18a, stating:

[T]he record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system, which the district court found to include a holistic formula of training, even more so.

Pet. App. 17a. Specifically affirming the district court's findings with respect to the impact of coeducation on the VMI system resulting from gender-based physiological differences, accommodation of privacy interests, and cross-sex interaction and relationships, the court of appeals agreed that coeducation would lead to "a substantial change in the egalitarian ethos that is a critical aspect of VMI's training." Pet. App. 14a. The court of appeals concluded that "if a court were to require the admission of women to VMI to give them access to this unique methodology, the decision would deny those women the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation." *Id.*

The appeals court held, however, that VMI's single-sex admissions policy violated the Fourteenth Amendment because the Commonwealth had not provided a similar type of educational institution for women. Pet. App. 20a.⁸ The court held that "VMI's continued status as a state institution is conditioned on the Commonwealth's satisfactorily addressing the findings we affirm and bringing the circumstances into conformity with the Equal Protection Clause of the Fourteenth Amendment." Pet. App. 21a. The court suggested that the Commonwealth could require VMI to admit women and make the necessary adjustments to its program, "establish parallel

⁸ There is a residential military program open to men and women at Virginia Polytechnic Institute and State University (VPI), Pet. App. 74a, but there is no all-women's residential military college in Virginia or elsewhere in the United States. Also, the VPI cadet program is not based on an adversative approach. Pet. App. 78a.

institutions or parallel programs," "abandon state support of VMI," or pursue "other more creative options or combinations." *Id.* The court remanded the case to the district court for remedial proceedings. Pet. App. 22a.

On November 17, 1992, the Fourth Circuit rejected VMI's petition for rehearing and suggestion for rehearing *in banc*, with two judges dissenting and two judges not participating. Pet. App. 102a-104a.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE PERSISTENT DOUBTS ABOUT THE CONSTITUTIONALITY OF SINGLE-SEX EDUCATIONAL INSTITUTIONS AND PROGRAMS.

This case presents the issue of whether it is constitutional for public schools to adopt single-sex admissions policies. The decision of the court of appeals, while appearing to acknowledge that such policies can be constitutionally justified, adopted the sort of scrutiny that will nearly always lead to invalidation. There is a conflict among the circuits and states about whether the Constitution requires the approach followed by the court of appeals in this case. Moreover, unless this Court grants certiorari and reverses, coeducation will be viewed as a constitutional imperative, and educational diversity and experimentation will be thwarted at a time when they are desperately needed.⁹

⁹ The significance of this case is perhaps also indicated by the participation before the Fourth Circuit of sixteen organizations as *amici curiae* urging reversal of the district court. For academic commentary on the decisions below, see William A. DeVan, *Toward A New Standard In Gender Discrimination: The Case of Virginia Military Institute*, 33 William & Mary L. Rev. 489 (1992) (student note) (hereinafter cited as "William & Mary Note"); Phillip Comer Griffith, *The Beat Goes On: District Court Upholds Virginia Military Institute's All-Male Admissions Policy in United States v. Virginia*, 43 Mercer L. Rev. 767 (1992) (student note); Melissa Taylor, *The VMI Decision: A Look At The Balancing Process In*

This Court has granted certiorari on this issue in three cases. In two of those cases, the decision of the court below allowing single-sex education was affirmed by an equally divided Court. See *Vorchheimer v. School Dist. of Philadelphia*, 532 F.2d 886 (3d Cir. 1975), *aff'd*, 430 U.S. 703 (1977) (rejecting female's challenge to all-male public high school under Fourteenth Amendment); *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971) (rejecting male's challenge to all-female state college under Fourteenth Amendment).

The third case, *Hogan*, presented a "narrow issue," 458 U.S. at 719, and resulted in a highly fact-specific opinion. While *Hogan* provides helpful guidance to lower courts as to the need for a fact-centered inquiry—and, as indicated in part A below, makes clear that single-sex admissions policies are permissible in some circumstances—this area of the law continues to pose difficult issues as to when courts should permit the states to recognize gender differences and in what manner the states should be permitted to do so. Unless this Court resolves these issues, legal doubt threatens the continuation of, and experimentation with, single-sex public schools and programs.

A. Single-Sex Programs Can Satisfy Constitutional Scrutiny When Based Upon Physiological And Developmental Differences Between Men And Women.

The United States has conceded, as it must, that the Fourteenth Amendment is not "a per se bar to public single-sex education." Pet. App. 17a. That conclusion is indisputable in view of this Court's decision in *Mississippi University for Women v. Hogan*, *supra*, where the Court considered a male litigant's challenge to the female-only admission policy of the School of Nursing at the Mississippi University for Women (MUW). The Court stated

Equal Protection Cases, 60 UMKC L. Rev. 393 (1991) (student note); Marcia Berman, *An Equal Protection Analysis of Public and Private All-Male Military Schools*, 1991 U. Chi. L. Forum 211 (student note) (hereinafter cited as "Chicago Note").

that a public university can maintain a single-gender admission policy consistent with the Equal Protection Clause if the policy "serves 'important governmental objectives'" and is "'substantially related to the achievement of those objectives.'" 458 U.S. at 724 (quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)).

The decision in *Hogan* striking down the admissions policy of the MUW nursing school was based on the evidence in the record indicating that the university's ostensible justification for the policy was a pretext and that, in any event, the policy was not sufficiently related to the claimed objective. The purpose proffered by the state—that the policy compensated for discrimination against women—was contradicted by evidence that women were already receiving nearly all nursing degrees awarded in Mississippi and in the United States as a whole when the MUW nursing school opened. See 458 U.S. at 727, 729. The Court concluded that the limiting of admissions to women reflected an outdated stereotype of nursing as a woman's profession, and not any pedagogical purpose. See *id.* at 729-30. The policy also failed the "substantial relationship" inquiry because the school's policy of permitting males "to attend classes as auditors fatally undermine[d] its claim that women, as least in the School of Nursing, are adversely affected by the presence of men." *Id.* at 730.

The test of intermediate scrutiny employed by the Court in *Hogan* does not prohibit all public single-sex education, and indeed, the Court expressly disclaimed any intention to address the constitutionality of single-sex education apart from the admissions policy of the particular school (the school of nursing) in the particular university involved in the case before it. See 458 U.S. at 723 n.7. Rather, the requirements of (i) an important governmental objective behind a single-sex admissions policy, and (ii) a substantial relationship between the policy and the achievement of that objective, are fully

satisfied where a school's single-sex educational program confers benefits beyond those available in a coeducational setting. Where, as here, the educational program also reflects actual differences in the developmental characteristics of the sexes, the case for its validity under *Hogan* is even stronger.¹⁰

The court of appeals in the present case properly held that VMI's single-sex admissions policy satisfies the *Hogan* standard. The court of appeals agreed that the policy serves the important governmental objective of providing a beneficial alternative form of education and that the policy is substantially related to the achievement of that objective because VMI could not provide the same benefits if it were coeducational. Pet. App. 13a-14a, 17a.

B. The Court Of Appeals In This Case Applied A Standard That Will Effectively Preclude Public Single-Sex Schools.

The court of appeals here regarded the constitutional defect as the absence of a parallel VMI-type program for women. Pet. App. 20a. The Fourth Circuit effectively held that a state cannot operate a single-sex school unless it operates at least *two* single-sex schools, one for men and one for women, offering the same type of educational program. See Pet. App. 17a-21a.

The Fourth Circuit's approach places a heavy and irrational burden on states seeking to justify single-sex programs—a burden more nearly resembling strict scrutiny than the mid-level standard applied in *Hogan*. In this case, the district court specifically found, based on extensive and un rebutted evidence of gender-based developmental differences, that women would be unlikely to benefit

¹⁰ This Court has made it clear in other cases that intermediate scrutiny of gender distinctions does not require a perfect means-end fit and can be based on general characteristics of the sexes, so long as the policy is based on reasoned analysis rather than stereotype. See *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464 (1981).

from the adversative model of education offered at VMI. See p. 6 *supra*. In addition, the record reflected that there is little or no demand for an all-women's residential military college in Virginia.¹¹ Nevertheless, the court of appeals held that VMI could not constitutionally operate as a single-sex institution unless Virginia establishes a VMI-type program or institution for women.

The approach taken by the court of appeals would limit government sponsorship of single-sex educational programs to those rare circumstances when public financial resources and student choice converge so as to permit the simultaneous creation, operation, and funding of identical parallel programs for males and females. This burden would be imposed even where, as here, the record establishes that developmental differences between the sexes and sharply different levels of demand make it impractical to provide the same program to both sexes. Even where parallel programs were established, there would be constant threats of litigation challenging any differences

¹¹ There has never been an all-female military college in the United States, much less one based on the adversative model. A89 (Stipulation). The enrollment at the Virginia Polytechnic Institute's coeducational military program indicates slight demand among females for participation in a residential corps of cadets. In the Fall of 1990, 93,318 females were enrolled in four-year undergraduate programs in Virginia. Of these, forty-four participated in the VPI corps of cadets—less than one-twentieth of one percent (.05%) of female undergraduates. VMI Exhibit 62(k).

Nationally, the figures are similar. Only three colleges other than Virginia Polytechnic Institute offer females the opportunity to participate in coed residential corps of cadets programs: Texas A&M, North Georgia College, and Norwich University. In the Fall of 1990, Texas A&M had 75 females in its corps (.04% of total four-year female public undergraduate enrollment in Texas); North Georgia, 25 (.06% of total four-year female public undergraduate enrollment in Georgia); and Norwich approximately 100 (1.9% of total four-year female public undergraduate enrollment in Vermont). VMI Exhibit 62(1). Thus, the total demand among females for participation in a residential corps of cadets program was less than 250 nationwide.

between the parallel institutions as depriving one sex or the other of equal treatment. Unless this judicial hostility is ameliorated, it is unlikely that any public single-sex educational program can survive.

We do not doubt that states are required to provide generally comparable educational opportunities to men and women, but the Fourth Circuit goes much further than this. In the Commonwealth of Virginia, a majority of the students at state-run colleges are women.¹² Women have the opportunity to participate in a residential military college program by participating in the Corps of Cadets at VPI.¹³ Although all of the state-run women's colleges in Virginia have now become coeducational as a result of the autonomous decisions of those institutions,¹⁴ there are five private women's colleges in Virginia that receive substantial state assistance through a tuition subsidy program for residents.¹⁵ Thus there is no basis on which a court could conclude that Virginia fails to provide women with access to higher educational opportunities comparable to those provided to men.

The decision below is ripe for review by this Court. The factual record was fully developed in a six-day trial, and the district court made extensive findings of fact that were largely sustained on appeal. The court of appeals reached a final decision that VMI's program, as it now stands, is unconstitutional. Although the district court and the parties will face remedial options, the constitutional holding of the court of appeals is not subject to alteration by further proceedings after remand.

¹² "In the Fall of 1989, enrollment at the 15 public institutions included 72,819 men and 85,441 women." Pet. App. 49a.

¹³ See notes 8 and 11 *supra*.

¹⁴ See Pet. App. 39a n.10.

¹⁵ See note 6 *supra*.

C. There Is A Conflict Among The Circuits And States On Whether An Otherwise Justified Single-Sex Program Is Unconstitutional When Identical Programs Are Not Provided For Members Of Each Sex.

The court of appeals held that, although VMI's single-sex admissions policy is fully justified under the standard of *Hogan*, there is an additional constitutional requirement that the state offer an identical opportunity to the other sex. Thus VMI cannot limit its admissions to men unless the state also operates a VMI-type program or institution for women. Pet. App. 20a.

The Fourth Circuit's approach in this case is the same as that of the Fifth Circuit in *Hogan*, which held that the absence of a parallel single-sex public institution for males doomed MUW's females-only admission policy. See *Hogan v. Mississippi University for Women*, 646 F.2d 1116, 1119 (5th Cir. 1981), *aff'd*, 458 U.S. 718 (1982). "It is not for this Court to make a choice between creating an all-male institution comparable to MUW or desegregating it. We say only that the maintenance of MUW today as the only state-supported single-sex collegiate institution in the State cannot be squared with the Constitution." 646 F.2d at 1119. It is significant that this Court, in affirming the result reached by the Fifth Circuit, did not adopt such a rationale.

Although this Court has not addressed the issue, there is a conflict among the circuits and states as to whether an otherwise constitutional single-sex program is unconstitutional when identical programs are not provided for both sexes. Because single-sex athletic teams are much more common than single-sex schools, this conflict has primarily developed in litigation as to when a public school can operate a single-sex athletic team without providing an identical opportunity for the other sex to participate separately in the same sport.¹⁶

¹⁶ See generally Jane C. Avery, *Validity, Under Federal Law, of Sex Discrimination in Athletics*, 23 A.L.R. Fed. 664 (1975); Vir-

The approach taken by the Fourth Circuit in the present case and the Fifth Circuit in *Hogan* was also taken by the Supreme Court of Appeals of West Virginia in a case holding that females could not be excluded from a high school baseball team, because the provision of a girls' softball team was not "substantially equivalent." *Israel v. West Virginia Secondary Schools Activities Comm.*, 388 S.E.2d 480, 485 (W. Va. 1989). A number of lower courts have also followed this approach.¹⁷

A conflicting approach to this issue has been taken by the Sixth and Ninth Circuits, as well as the Supreme Court of Minnesota and a number of lower courts. For example, in *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983), the court upheld the exclusion of males from a school volleyball team notwithstanding the absence of any all-male (or even any mixed-gender) volleyball team. The Ninth Circuit specifically rejected the argument that Arizona was required to provide a parallel program for males, nor did the Ninth Circuit require Arizona to articulate a reason for the absence of such a program:

ginia Croudace & Steven Desmarais, *Where the Boys Are: Can Separate Be Equal In Sports?*, 58 So. Cal. L. Rev. 1425 (1985) (student note).

¹⁷ See *Saint v. Nebraska School Activities Ass'n*, 684 F. Supp. 626 (D. Neb. 1988) (unconstitutional to exclude females from male wrestling team where no female wrestling team); *Lantz v. Ambach*, 620 F. Supp. 663, 665-66 (S.D.N.Y. 1985) (unconstitutional to exclude females from high school football team where no all-female football team was provided); *Force v. Pierce City R-VI School Dist.*, 570 F. Supp. 1020 (W.D. Mo. 1983) (unconstitutional to exclude females from football team where school provided male-only football team was provided); *Force v. Pierce City R-VI School Secondary School Athletic Ass'n*, 415 F. Supp. 569, 572 (E.D. Tenn. 1976) (unconstitutional to exclude females from male baseball team where no baseball team was provided for females); *Gilpin v. Kansas State High School Activities Ass'n, Inc.*, 377 F. Supp. 1233 (D. Kan. 1973) (unconstitutional to exclude females from cross-country competition where no all-female cross-country competition was provided).

We recognize that specific athletic opportunities could be equalized more fully in a number of ways. For example, participation could be limited on the basis of specific physical characteristics other than sex, a separate boys' team could be provided, a junior varsity squad might be added, or boys' participation could be allowed but only in limited numbers. The existence of these alternatives shows only that the exclusion of boys is not *necessary* to achieve the desired goal. It does not mean that the required substantial relationship does not exist. . . .

In this case, the alternative chosen may not maximize equality, and may represent trade-offs between equality and practicality. But since absolute necessity is not the standard, and absolute equality of opportunity in every sport is not the mandate, even the existence of wiser alternatives than the one chosen does not serve to invalidate the policy here since it is substantially related to the goal. That is all the standard demands.

Id. at 1131-32 (footnote omitted). *Accord Cape v. Tennessee Secondary School Athletic Ass'n*, 563 F.2d 793 (6th Cir. 1977) (upholding system of separate basketball teams for girls and boys, despite the fact that girls' teams played a half-court game that provided less opportunity to develop skills); *Striebel v. Minnesota State High School League*, 321 N.W.2d 400 (Minn. 1982) (upholding system of separate tennis and swimming teams for boys and girls, with different seasons for each sex).¹⁸

¹⁸ See also *B.C. ex rel. C.C. v. Board of Educ.*, 531 A.2d 1059, 1064-66 (N.J. Super. App. Div. 1987) (constitutional to exclude males from female field hockey where no male field hockey team provided); *Mularadelis v. Haldane Cent. School Bd.*, 427 N.Y.S.2d 458, 463-64 (App. Div. 1980) (constitutional to exclude males from high school's only tennis team); *Petrie v. Illinois High School Ass'n*, 394 N.E.2d 855, 862 (Ill. App. Ct. 1979) (constitutional to exclude males from high school's only volleyball team).

D. Unless Resolved By This Court, The Issue Will Continue To Create Legal Uncertainty In A Variety Of Contexts.

The issue on which these courts have divided is one that arises frequently in the lower courts and is likely to continue to arise in a number of contexts. Each of the other remaining public single-sex institutions of higher learning will inevitably be subject to lawsuits seeking that it become coeducational.¹⁹ Also, as indicated in part E below, the renewed interest in public single-sex education programs at the primary and secondary level has led to litigation and is likely to continue. See p. 20 *infra*. The constitutionality of single-sex social organizations such as fraternities and sororities at public institutions has been the subject of academic commentary, and may be the subject of Equal Protection challenges based on differing characteristics of all-male or all-female organizations or facilities.²⁰ Moreover, the reasoning of the Fourth Circuit here and the other courts following this approach casts doubt on the validity of a range of governmental policies in which programs or facilities are provided only for one sex, such as the provision of shelters for battered spouses

¹⁹ There are two public all-women's colleges remaining in the United States (Texas Women's University in Denton, Texas and Douglass College in New Brunswick, New Jersey) and one public all-men's college apart from VMI (The Citadel in Charleston, South Carolina). No state operates both an all-male college and an all-female college.

The Citadel's single-sex admissions policy has recently been challenged. *Johnson v. Jones*, Civ. No. 2:92-1674-2 (D.S.C., complaint filed June 11, 1992).

²⁰ See Daniel L. Schwartz, *Discrimination on Campus: A Critical Examination of Single-Sex College Social Organizations*, 75 Cal. L. Rev. 2117 (1987). Title IX of the Civil Rights Act of 1964, as amended, exempts social fraternities and sororities, YMCA, YWCA, Girl Scouts, Boy Scouts, and similar organizations. 20 U.S.C. § 1681 (a) (6). Regulations issued under Title IX permit separate housing, toilet, locker room and shower facilities for men and women. These facilities are required to be "comparable" but need not be identical. 34 C.F.R. § 106.32-33 (1992).

only for women, even though the policy is based on actual differences between the needs of the sexes.

This legal issue also has implications for the administration of prisons, nearly all of which are single-sex institutions. Courts have generally assumed that there is an adequate constitutional justification for operating single-sex prisons, but there has been substantial litigation over differences between men's and women's prisons.²¹ The approach of the court of appeals in this case would seem to require that if prisons are not mixed-sex institutions, there must be virtually identical programs provided for men and women. For example, a state establishing a "boot camp" training program for young men would be required to establish an identical program for young women, even if the developmental characteristics of women are different and they would be unlikely to benefit from such a program.²²

E. Legal Doubts Threaten Educational Diversity And Innovation At A Time When It Is Urgently Needed.

In deciding *Hogan*, this Court took pains to make clear that it was deciding only the "narrow issue," 458 U.S. at 719, of the legality of the single-sex admissions policy of the MUW nursing school, and specifically declined to

²¹ See generally Sonja A. Soehnel, *Sex Discrimination in Treatment of Jail or Prison Inmates*, 12 A.L.R.4th 1219 (1982). One commentator has argued that the intermediate scrutiny test of *Hogan* requires abolition of single-sex prisons. See Rosemary Herbert, *Women's Prisons: An Equal Protection Evaluation*, 94 Yale L.J. 1182 (1985) (student note). For a contrasting approach, see *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989), where the court of appeals accepted the necessity of separating prisoners by sex and declined to find that incarcerating female prisoners at a greater distance from the District of Columbia violates the Equal Protection Clause.

²² A female inmate recently filed suit seeking admission to an experimental "boot camp" program established for male inmates in Virginia. *West v. Virginia Dep't of Corrections*, No. 92-0887-R (W.D. Va., complaint filed Nov. 23, 1992).

address the single-sex admissions policy as employed by other parts of the same university. 458 U.S. at 723 n.7. Nonetheless, the Mississippi University for Women became entirely coeducational following that decision, apparently as the result of threatened litigation. Indeed, according to one account, "two lawyers with male clients appeared in the admissions office requesting admission to the undergraduate university" within thirty minutes after the *Hogan* decision was announced locally on the radio. William & Mary Note, *supra* note 9, at 496 n.34.

More recently, a number of school boards have considered single-sex elementary and secondary schools for urban males, based on the view that single-sex education will benefit them. See generally Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 Harv. L. Rev. 1741 (1992) (hereinafter cited as "Harvard Note"); Pamela J. Smith, *All-Male Black Schools And The Equal Protection Clause: A Step Forward Toward Education*, 66 Tulane L. Rev. 2003 (1992) (student note) (hereinafter cited as "Tulane Note"). The decision of the Detroit School Board in 1991 to establish three such schools was abandoned as the result of a lawsuit filed by the National Organization for Women and the American Civil Liberties Union (who also participated as *amici curiae* in the proceedings below). Shortly before the schools were to open, the district court preliminarily enjoined the School Board from operating the schools as all-male institutions. See *Garrett v. Board of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991). Thereafter, the parties entered into a settlement in which the School Board agreed that the schools would be coeducational. See Harvard Note, *supra*, at 1746 n.39; Tulane Note, *supra*, at 2006 n.8.

Thus, despite the efforts of this Court in *Hogan*, the "inevitable spillover" that troubled Justice Blackmun in that case has plainly occurred. See *Hogan*, 458 U.S. at 734 (Blackmun, J., dissenting). As a practical matter,

the uncertainty as to when single-sex schools will be upheld and when they will be found unlawful can only act as a powerful deterrent to the continuation of publicly supported single-sex education and to experimentation with single-sex education in new settings.²³

Over the past thirty years, a rush to coeducation prompted by social, economic, and legal factors has dramatically reduced the number of private single-sex high schools and colleges, and has all but eliminated their public counterparts. In 1960, there were approximately 240 men's colleges and 260 women's colleges.²⁴ Today, there are eleven men's colleges, enrolling about 11,000 students, and 56 women's colleges, enrolling about 64,000 students. Pet. App. 52a.²⁵ It is ironic that the constitutional obstacles to public single-sex education are cresting even as recent educational scholarship provides new evidence of the benefits of single-sex education. This scholarship is reflected in the record below and in the findings of the district court. See Pet. App. 82a-85a.

Congress also has recognized the value of single-sex education for males and females. "Traditionally and continually" single-sex college and universities are exempt from the non-discrimination mandate of Title IX. See 20

²³ The effect of this uncertainty is magnified by the potential for substantial attorneys' fee liability under fee-shifting statutes, such as 42 U.S.C. § 1988, which have been interpreted to require losing defendants in such litigation to pay the plaintiffs' fees (potentially increased by a multiplier for risk or delay) except under "special circumstances." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). On the other hand, prevailing defendants may receive an award of fees only if the suit was "frivolous, unreasonable, or groundless, or . . . the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

²⁴ Cornelius Riordan, *Girls & Boys in School: Together or Separate?* 4 (1990).

²⁵ In 1991, there were 6.4 million male college students and 7.6 million females. U.S. Department of Commerce, *Statistical Abstract of the United States* 143 (1992).

U.S.C. § 1681(a)(5).²⁶ The legislative history of Title IX reflects specific congressional approval of the single-sex admission policies of VMI and The Citadel, a similar state-supported institution in South Carolina. See 118 Cong. Rec. 5813 (1972); 117 Cong. Rec. 30409-30414 (1971).

The effective abolition of public single-sex education by the judiciary would be harmful to females, as a wealth of scholarship establishes that females derive particular benefit from some forms of single-sex education. See Pet. App. 84a-85a; Daryl G. Smith, *Women's Colleges and Coed Colleges*, 61 J. Higher Educ. 181 (1990); Valerie E. Lee & Anthony S. Bryk, *Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes*, 78 J. Educ. Psychol. 381 (1986). It would also harm males whose educational needs may be best addressed in a single-sex program. Pet. App. 84a-85a. Because adolescent males, particularly minorities, currently have significantly lower levels of educational achievement than their female counterparts, see Tulane Note, *supra* note 9, at 2040-43, the judicial cloud over the single-sex programs considered in Detroit and other cities is particularly undesirable.

It is also not clear that the legal threat to single-sex institutions can be confined to those that are publicly operated. Many private colleges receive governmental assistance, such as the tuition subsidy program provided by the Commonwealth of Virginia. See Pet. App. 53a. Private educational institutions also depend heavily on favorable treatment under federal and state tax laws. Moreover, a number of private colleges and secondary schools have ROTC programs sponsored by the U.S. Department of Defense. See Chicago Note, *supra* note 9, at 227-28. A number of commentators have suggested that these governmental relationships may subject the

²⁶ The admissions policies of single-sex schools at the elementary and secondary level are likewise exempt from Title IX. See 20 U.S.C. § 1681(a)(1).

admissions policies of private single-sex institutions to legal challenges.²⁷

After surveying the academic literature and the results of his own studies, one scholar concluded as follows:

The question of single or mixed-sex schooling is complex. There are pros and cons on either side. Yet sufficient grounds now exist for reconsidering the potential of single-sex schooling, at least as an option, representing an alternative to mixed-sex schools. The closing of traditional single-sex secondary and post-secondary schools should be halted. Furthermore, in the public sector, single-sex education merits exploration on an experimental and limited basis.

Cornelius Riordan, *Many Students, Especially Women, Are Best Served by Single-Sex Schools and Colleges*, 2 Debates on Educational Issues 3 (Nov.-Dec. 1990).

This Court should grant certiorari and reverse the decision of the court of appeals to eliminate the uncertainty that threatens to circumscribe educational innovation at a time when the need for it is critical.

²⁷ Janella Miller, *The Future of Private Women's Colleges*, 7 Harv. Women's L.J. 153 (1984); Chicago Note, *supra* note 9; Richard Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 J.L. & Educ. 171 (1982).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

RICHARD K. WILLARD

Counsel of Record

DAVID A. PRICE

STEPTOE & JOHNSON

1330 Connecticut Avenue, N.W.

Washington, D.C. 20036

(202) 429-3000

GRIFFIN B. BELL

WILLIAM A. CLINEBURG, JR.

KING & SPALDING

2500 Trust Company Tower

Atlanta, Georgia 30303

ROBERT H. PATTERSON, JR.

WILLIAM G. BROADDUS

ANNE MARIE WHITEMORE

FRANK B. ATKINSON

MCGUIRE, WOODS, BATTLE

& BOOTHE

One James Center

Richmond, Virginia 23219

Counsel for Virginia Military

Institute, Its Board of Visitors

and Superintendent, VMI

Foundation, Inc., and the VMI

Alumni Association

APPENDICES

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-1690

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.

COMMONWEALTH OF VIRGINIA; LAWRENCE DOUGLAS WILDER, Governor of the Commonwealth of Virginia; VIRGINIA MILITARY INSTITUTE; JOSEPH M. SPIVEY, III, President of the Virginia Military Institute Board of Visitors; JOHN WILLIAMS KNAPP, Superintendent of Virginia Military Institute; THE BOARD OF VISITORS OF VIRGINIA MILITARY INSTITUTE; THOMAS N. DOWNING; ELIZABETH P. HOISINGTON, Brig. Gen.; ROBERT Q. MARSTON; A. COURTLAND SPOTTS, III; DANIEL F. FLOWERS; B. POWELL HARRISON, JR.; ROBERT H. SPILMAN; SAMUEL E. WOOLWINE; JAMES W. ENOCHS, JR.; WILLIAM A. HAZEL; HARVEY S. SADOW; DOUGLAS K. BAUMGARTNER; DANIEL D. CAMERON; GLEN N. JONES; JOHN W. ROBERTS, Members of the Board of Visitors of Virginia Military Institute; VMI FOUNDATION, INCORPORATED; VMI ALUMNI ASSOCIATION,

Defendants-Appellees,

and

GORDON K. DAVIES, Director of the Virginia State Council of Higher Education; THE VIRGINIA STATE COUNCIL OF HIGHER EDUCATION AND ITS MEMBERS AND OFFICERS,

Defendants.

VIRGINIA WOMEN ATTORNEYS ASSOCIATION; VIRGINIA CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVER-

SITY WOMEN; VIRGINIA CHAPTER OF THE OLDER WOMEN'S LEAGUE; VIRGINIA FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INCORPORATED; FRIENDS OF VMI FOR EQUALITY; ALEXANDER W. ASTIN; AMERICAN CIVIL LIBERTIES UNION; ACLU FOUNDATION OF VIRGINIA; NATIONAL WOMEN'S LAW CENTER; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; CENTER FOR WOMEN POLICY STUDIES; NATIONAL ORGANIZATION FOR WOMEN; NOW LEGAL DEFENSE AND EDUCATION FUND; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; VIRGINIA NOW LEGAL DEFENSE AND EDUCATION FUND, INCORPORATED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND,

Amici Curiae.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke.

Jackson L. Kiser, District Judge.

(CA-90-126-R)

Argued: April 8, 1992

Decided: October 5, 1992

Before PHILLIPS and NIEMEYER, Circuit Judges, and WARD, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

Vacated and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge Phillips and Senior Judge Ward joined.

COUNSEL

ARGUED: Jessica Dunsay Silver, Civil Rights Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Robert H. Patterson, Jr., MCGUIRE, WOODS, BATTLE & BOOTHE, Richmond, Virginia; Griffin B. Bell, KING & SPALDING, Atlanta, Georgia, for Appellees. ON BRIEF: John R. Dunne, Assistant Attorney General, David O. Simon, Acting Deputy Assistant Attorney General, Thomas E. Chandler, Civil Rights Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. William G. Broaddus, Anne Marie Whittemore, J. William Boland, Frank B. Atkinson, H. Alexander Wise, MCGUIRE, WOODS, BATTLE & BOOTHE, Richmond, Virginia; William A. Clineburg, Jr., KING & SPALDING, Atlanta, Georgia; William B. Poff, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia, for Appellees. Eileen N. Wagner, Richmond, Virginia; Karen R. Keesling, Falls Church, Virginia; Sylvia Clute, Richmond, Virginia, for Amici Curiae Virginia Women Attorneys Association, Virginia Chapters of the American Association of University Women, Older Women's League, Virginia Federation of Business and Professional Women's Clubs, Inc., Friends of VMI for Equality, Dr. Alexander W. Astin. Ellen J. Vargyas, Shirley Sagawa, Marcia D. Greenberger, NATIONAL WOMEN'S LAW CENTER, Washington, D.C.; Joan E. Bertin, Elisabeth A. Werby, Isabelle Katz Pinzler, Jacqueline A. Berrien, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York; Stephen B. Pershing, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA, Richmond, Virginia, for Amici Curiae American Civil Liberties Union, ACLU Foundation of Virginia, National Women's Law Center, American Association of University Women, Center for Women Policy Studies, National Organization for Women, NOW Legal Defense and Education Fund, Virginia NOW, Virginia NOW Legal Defense and Education Fund, Women's Law Project, Women's Legal Defense Fund.

OPINION

NIEMEYER, Circuit Judge:

The male-only admissions policy of Virginia Military Institute (VMI), a state institution of higher education located in Lexington, Virginia, is challenged by the federal government under the Equal Protection Clause of the Fourteenth Amendment and the jurisprudence of *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). The government contends that the school's policy discriminates against women and is not substantially related to the achievement of an important governmental objective.

Following a six-day trial and extensive findings of fact, the district court concluded that VMI's male-only policy "is fully justified" by a generally accepted benefit of single-sex education, and that the admission of women would "significantly" change the "methods of instruction and living conditions" at VMI. Having concluded that "diversity in education" was a legitimate state interest, the district court summarized, "I find that both VMI's single-sex status and its distinctive educational method represent legitimate contributions to diversity in the Virginia higher education system, and that excluding women is substantially related to this mission." 766 F. Supp. 1407, 1411-13 (W.D. Va. 1991).

The United States contends on appeal that enhancing diversity by offering a distinctive single-sex education to men only is not a legitimate state objective and that the Commonwealth and VMI have not established a sufficient justification for VMI's male-only admissions policy.

For the reasons that we give more fully below, we accept the district court's factual determinations that VMI's unique methodology justifies a single-gender policy and material aspects of its essentially holistic system would be substantially changed by coeducation. Moreover, all parties appear to acknowledge, as did the dis-

trict court, the positive and unique aspects of the program. The Commonwealth of Virginia has not, however, advanced any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not to women. Because Virginia has failed to articulate an important objective which supports the provision of this unique educational opportunity to men only, we vacate the judgment of the district court and remand the case to the district court to require the Commonwealth of Virginia to formulate, adopt, and implement a plan that conforms to the principles of equal protection discussed herein. We do not, however, order that women be admitted to VMI if adequate alternatives are available.

I

VMI was established by the Virginia legislature in 1839 as a four-year military college, and its graduates have distinguished themselves in the 150 years since. A VMI professor, Thomas "Stonewall" Jackson, achieved notoriety as a confederate general during the Civil War. The VMI cadet corps fought Union troops at New Market, Virginia, and almost 1800 alumni (constituting 94% of all VMI graduates at the time) fought in the Civil War. Among the thousands of alumni who have served this country during war is General of the Army George C. Marshall, and six have been awarded the Congressional Medal of Honor. VMI graduates have achieved similarly in civilian life. The school's success and reputation are uncontroverted in this case. Indeed, it is apparently that very success in producing leaders that has made admission to VMI desirable to some women, prompting the government to challenge the policy of excluding women.

VMI is financially supported by the Commonwealth of Virginia and remains "subject to the control of the [Virginia] General Assembly." Va. Code Ann. § 23-92. It is

governed by a Board of Visitors, which the Commonwealth expressly charges with prescribing "the terms upon which cadets may be admitted, their number, the course of their instruction, the nature of their service, and the duration thereof." Va. Code Ann. § 23-104.

The 15 state-supported institutions of higher learning in Virginia,¹ including VMI, are generally supervised and coordinated by the State Council of Higher Education for Virginia. While the Virginia General Assembly assigns various responsibilities to the Council of Higher Education, including the responsibility "to review and approve or disapprove of any proposed change in [an existing institution's] statement of mission," it delegates to each institution the right to modify its mission and to establish admissions criteria. See Va. Code Ann. § 23-9.6:1 (2).

The mission of VMI is to produce "citizen-soldiers, educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary."² Focusing primarily on character de-

¹ In addition to VMI, the list includes: Christopher Newport College, Clinch Valley College, The College of William and Mary, George Mason University, James Madison University, Longwood College, Mary Washington College, Norfolk State University, Old Dominion University, Radford University, University of Virginia, Virginia Commonwealth University, Virginia Polytechnic Institute and State University, and Virginia State University.

² As stated in the final report of the Mission Study Committee of the VMI Board of Visitors, dated May 16, 1986:

The Virginia Military Institute believes that the measure of a college lies in the quality and performance of its graduates and their contributions to society.

Therefore, it is the mission of the Virginia Military Institute to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American De-

velopment and leadership training through a unique and intense process, characterized as an "adversative" educational model drawn from earlier military training and English public schools, VMI's educational method emphasizes physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of values. The process is designed to foster in VMI cadets doubts about previous beliefs and experiences and to instill in cadets new values which VMI seeks to impart. The model employs a hostile, spartan environment that is characterized by six inter-related components—the "rat line," the class system, the "dyke" system, the honor code, the barracks life, and the military system.

The *rat line* refers to the harsh orientation process to which all new cadets ("rats") are subjected during their first seven months at VMI. Designed to be comparable to the Marine Corps' boot camp in terms of physical rigor and mental stress, the rat line includes indoctrination, minute regulation of individual behavior, frequent punishments, rigorous physical education, and military drills. The *class system* entails the peer assignment of privileges and responsibilities, including supervisory roles, to classes of cadets based on rank. The *dyke system*, which is "closely linked" with the rat line, assigns each rat to a first classman, who acts as a mentor ("dyke") to relieve some of the stress generated from the rat line. The dyke system aims to create cross-class bonding and provide a model for leadership and support. The *honor code*, that a cadet "does not lie, cheat, steal

mocracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril.

To accomplish this result, the Virginia Military Institute shall provide to qualified young men undergraduate education of highest quality—embracing engineering, science, and the arts—conducted in, and facilitated by, the unique VMI system of military discipline.

nor tolerate those who do," is a stringently enforced code of conduct applying to all aspects of life at VMI and providing the single penalty of expulsion for its violation. The *barracks life*, described as important to VMI's ethos of egalitarianism, is dictated by the nature and functioning of the barracks. Each class is assigned to one floor of the four-story barracks structure and three to five cadets are assigned to a room. The rooms are stark and unattractive. There are no locks on the doors and windows are uncovered. Access to bathrooms is provided by outside corridors visible to the quadrangle, and there is a total lack of privacy in the barracks, where cadets are subjected to constant scrutiny and minute regulation, all intended to foster cadet equality and to induce stress. Finally, the *military system*, providing regulation, etiquette, and drill, pervades life at VMI. As part of the military system each cadet must participate in an ROTC program throughout his four years. The district court found that the various systems in place at VMI are integrated and interdependent, and several of them cannot be changed without materially affecting others.

VMI, with approximately 1,300 male students, has never accepted applications from women. During the two years preceding the filing of this action, it did, however, receive over 300 inquiries from women. Today, VMI is the only state-supported, single-sex college in Virginia, although historically most of Virginia's 15 public colleges were at one time single-sex institutions.

The government instituted this action on March 1, 1990, under Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, on behalf of a female high school student who desired admission to VMI, contending that VMI's male-only admissions policy violates the Equal Protection Clause of the Fourteenth Amendment. The suit named as defendants the Commonwealth of Virginia; its governor, Lawrence Douglas Wilder, VMI and its Board of Visitors and top officers; and the State Council

of Higher Education for Virginia, its members and its Director.³ The action sought an order enjoining discrimination based on sex and requiring the defendants "to formulate, adopt, and fully and timely implement a plan to remedy fully their discriminatory policies and practices."

In his answer to the complaint, Governor Wilder stated that "the failure to admit females to [VMI] is against his personal philosophy," and "no person should be denied admittance to a state supported school because of his or her gender." On his assurance that he would "abide by the decision of the Court," Governor Wilder was given permission not to participate in the litigation.

As the result of Governor Wilder's position and because of the conflict between the Governor, the Commonwealth, and VMI, the Attorney General of Virginia was granted leave to withdraw from representation of any party. She stated in a letter to the Governor,

You have indicated that VMI's admission policy serves no legitimate public policy objective In the absence of a statute explicitly expressing the General Assembly's view on the policy issue, your statement of the Commonwealth policy is persuasive.

As a result, the Commonwealth obtained *pro bono* counsel, who then sought and obtained on behalf of the Commonwealth a stay of proceedings against it during the liability phase of litigation, on the condition that it abide by the court's liability determination. Accordingly, the Governor and the Commonwealth did not participate in the liability determinations, which by agreement include this appeal.

³ The VMI Foundation, Inc., and the VMI Alumni Association, neither of which is a state agency, were allowed to participate in the litigation as intervenors.

II

The district court began its opinion by noting that in May 1864, during the Civil War, VMI cadets bravely fought Union troops at New Market, Virginia. The court continued, "the combatants have again confronted each other, but this time the venue is in this court." What was not said is that the outcome of each confrontation finds resolution in the Equal Protection Clause. When the Civil War was over, to assure the abolition of slavery and the federal government's supervision over that policy, *all* states, north and south, yielded substantial sovereignty to the federal government in the ratification of the Fourteenth Amendment, and every state for the first time was expressly directed by federal authority not to deny any *person* within the state's jurisdiction "equal protection of the laws." U.S. Const. amend. XIV, § 1. The government now relies on this clause to attack VMI's admissions policy.

The obvious appeal to fairness in requiring the equal application of law too often becomes entangled with generalized notions of equality as referred to in Lincoln's Gettysburg Address⁴ and, before that, the Declaration of Independence,⁵ and these generalizations tend to overwhelm the difficult task of deciding what is meant by equal protection. We recognize that all persons are in many important respects different and that they were created with differences, and it is not the goal of the Equal Protection Clause to attempt to make them the same. To apply law to different persons with a mind toward making them the same might result, among other things, in the unequal application of the law. Thus, no

⁴ "Four score and seven years ago, our fathers brought forth upon this continent a new nation, conceived in liberty and dedicated to the proposition that *all men are created equal*."

⁵ "We hold these Truths to be self-evident, that *all Men are created equal*."

one suggests that equal protection of the laws requires that all laws apply to all persons without regard to actual differences. See *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were actually alike . . .").

Thus, although it is established that the Fourteenth Amendment "does not deny to States the power to treat different classes of persons in different ways," *Reed v. Reed*, 404 U.S. 71, 75 (1971), when a state regulation employs classifications, the defining criteria must have a "fair and substantial relation" to the objective of the regulation. *Id.* at 76. An equal protection analysis, therefore, must determine initially whether the class of persons to which a state regulation applies is defined in a manner that fairly and substantially relates the class to the purpose of the regulation. But the appropriate inquiry cannot end there. To protect against unlawful discrimination the analysis must also address whether the regulation, itself, serves an adequate governmental purpose.

Because almost every action taken by the state can be characterized as involving some form of classification, ranging from the benign to the invidious, different sorts of classifications have led to different levels of scrutiny. A classification based on race or national origin or which affects fundamental rights secured by the Constitution, because it is deemed to be inherently suspect, is examined most closely and is justified only by a necessary relationship to a compelling state interest. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984) (racial classification). On the other hand, other classifications, based, for example, on economic factors, need only be rationally related to a legitimate governmental interest. See, e.g., *City of Cleborne v. Cleborne Living Ctr., Inc.*, 473 U.S. 432, 439-40 (1985). A classification based on sex requires some scrutiny more focused than that for eco-

conomic classification. While classification by sex is not subjected to the same strict scrutiny as are classifications by race and national origin or which affect fundamental rights, the Supreme Court has developed an intermediate level of review for gender-based classifications. "To withstand intermediate scrutiny, a statutory classification must be substantially related to an *important governmental objective*." *Clark v. Jeeter*, 486 U.S. 456, 461 (1988) (emphasis added); *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

Accordingly, to conduct the appropriate Fourteenth Amendment analysis in this case, we must determine whether the state policy of excluding women from admission to VMI is substantially related to an important policy or objective of Virginia.

III

VMI argues that its own admissions policy is the state's policy because the admissions policy is by statute delegated to each state institution. The code provisions establishing VMI provide that its Board of Visitors "shall prescribe the terms upon which cadets may be admitted, their number, the course of their instruction, the nature of their service, and the duration thereof." Va. Code Ann. § 23-104. And this delegation of admissions policy-making is confirmed by the language of Va. Code Ann. § 23-9.6:1(2), which provides that the Council of Higher Education is not empowered to affect "the standards and criteria for admission of any public institution, whether related to academic standards, residence or other criteria, it being the intention of this section that . . . student admission policies shall remain a function of the individual institutions." VMI thus contends that its admissions policy becomes the state policy so that, as its admissions policy is justified by the mission of developing citizen soldiers, a legitimate and important state purpose is served.

To address VMI's argument, we must first decide whether VMI's male-only admissions policy, maintained pursuant to state-delegated authority, is a classification justified by a fair and substantial relationship with the institution's mission of developing citizen soldiers, and this in turn leads to an examination of whether VMI's mission would be materially altered by the admission of women.

Much of the debate between the parties relates to the physiological differences between men and women and the question of a woman's ability to perform and endure the physical standards now imposed on men, it is also it is agreed by the parties that *some* women can meet the physical standards now imposed on men, it is also agreed that a smaller percentage of women can do so. Based on evidence about the experience of the service academies and the Marine Corps, the district court was justified in finding that if women were to be admitted, VMI would have to convert to a dual-track physical training program in order to subject women to a program equal in effect to that of men, and that, as found by a study conducted at West Point, cadets of both sexes would nevertheless perceive the treatment of them as unequal leading to jealousy and resentment.

All the parties also agree that men and women would and should be entitled to some degree of privacy, at least to the extent that men and women not, in all respects, be exposed to each other. While again there was much debate among the parties as to the changes that might be required to accommodate this at VMI with the admission of women, all agreed that some accommodation would be necessary.

Finally, the parties have debated extensively the effect of cross-sexual confrontations that the adversative program would produce. Testimony was received that the deliberate harassment that upper-classmen give to "rats"

would play out differently when the upper-classman is of one sex and the "rat" another. While the government attributed the predicted effect of this as stereotyping, the evidence supported the district court's finding that cross-sexual confrontation and interaction introduces additional elements of stress and distraction which are not accommodated by VMI's methodology. The court relied on testimony by experts and similar such observations made in the West Point study.

The sum of the changes that could be expected prompted the district court to conclude that if VMI became co-educational, it would offer "neither males nor females the VMI education that now exists." The court observed that "equal treatment would necessarily give way to fair treatment, thus undermining egalitarianism," which is a critical characteristic that now pervades several aspects of VMI's methodology. And the record supports the district court's findings that at least these three aspects of VMI's program—physical training, the absence of privacy, and the adversative approach—would be materially affected by coeducation, leading to a substantial change in the egalitarian ethos that is a critical aspect of VMI's training.

The district court's conclusions that VMI's mission can be accomplished only in a single-gender environment and that changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology are adequately supported. And the district court was not clearly erroneous in concluding that if a court were to require the admission of women to VMI to give them access to this unique methodology, the decision would deny those women the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation. The *Catch-22*^{*} is that

^{*} From the paradoxical rule found in the novel, *Catch-22*, by Joseph Heller (1961).

women are denied the opportunity when excluded from VMI and cannot be given the opportunity by admitting them, because the change caused by their admission would destroy the opportunity.

It is not the maleness, as distinguished from femaleness, that provides justification for the program. It is the homogeneity of gender in the process, regardless of which sex is considered, that has been shown to be related to the essence of the education and training at VMI.

The argument by the government that VMI's existing program is maintained as the result of impermissible stereotyping and overly broad generalizations, without a more detailed analysis, might lead, if accepted, to a finding that would impose a conformity that common experience rejects. Men and women are different, and our knowledge about the differences, physiological and psychological, is becoming increasingly more sophisticated. Indeed the evidence in this case amply demonstrated that single-genderness in education can be pedagogically justifiable.

For instance, in a ten-year empirical study reported by Alexander W. Astin in *Four Critical Years: Effects of College on Beliefs, Attitudes, and Knowledge* (San Francisco: Jossey-Bass 1977), it was found that single-sex colleges have advantages over coeducational colleges in numerous areas. A summary of the report provided by the parties in this case states:

Single-sex colleges show a pattern of effects on both sexes that is almost uniformly positive. Students of both sexes become more academically involved, interact with faculty frequently, show large increases in intellectual self-esteem, and are more satisfied with practically all aspects of college exper-

ience (the sole exception is social life) compared with their counterparts in coeducational institutions.

J.A. 1830. In addition to providing substantial benefits to college students, single-sex education also has been found to have salutary consequences for sexual equality in the job market. In a study conducted by Marvin Bressler and Peter Wendell, *The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations*, 51 J. Higher Educ. 650, 662 (1980), the authors observed that in single-sex colleges, the students were more likely to set aside initial, stereotypical job aspirations in favor of more sex-neutral aspirations. They concluded from their data,

The available evidence thus fails to support the hypothesis that coeducation is a useful instrument for altering the imbalance in career aspirations of academically superior men and women undergraduates.

* * * *

[I]f all selective residential colleges reverted to single sex status, a notable fraction of all men and an even larger proportion of all women would probably renounce initial career commitments, a development which would have salutary consequences for sexual equality in the job market.

The experts for both sides in this case appear to agree with the conclusions reached in these studies.

Thus, while the data support a pedagogical justification for a single-sex education, they do not materially favor either sex. Both men and women appear to have benefited from single-sex education in a materially similar manner. The evidence about the VMI system suggests no differently. The problems that could be anticipated by coeducation at VMI, which are suggested by VMI generally to rise from physiological differences between men and women, needs for privacy, and cross-sexual con-

frontations, would not be anticipated in an all-female program with the same mission and methodology as that of VMI.⁷

In summary, the record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system, which the district court found to include a holistic formula of training, even more so. It is not remarkable therefore that the government in its brief conceded, "[I]t is not our position that the Fourteenth Amendment embodies a per se bar to public single-sex education."

IV

While this conclusion answers the question of whether VMI's male-only policy is justified by its institutional mission, the argument does not answer the larger question of whether the unique benefit offered by VMI's type of education can be denied to women by the state under a policy of diversity, which has been advanced as the justification and which was relied on by the district court.

The parties agree that VMI offers a unique combination of education and training that makes a positive contribution offered by no other institution.⁸ And the district court found, apparently without exception from any party, that "VMI's military program is absolutely uni-

⁷ We do not intend to imply that separate, single-sex institutions or programs are "equal" to coeducational ones for equal protection purposes. But, to the contrary, the data suggest that *differences* between a single-gender student population and a coeducational one justify a state's offering single-gender education.

⁸ At one point VMI suggested that a similar educational opportunity was provided to women by the program at Virginia Polytechnic Institute and State University. It has not pressed that point and in its brief confirms that VMI's program is "unique and remarkably successful." Similarly the government characterized VMI's program as "distinctive" and "not available anywhere else in Virginia."

que. No other school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI." The decisive question in this case therefore transforms to one of why the Commonwealth of Virginia offers the opportunity only to men. While VMI's institutional mission justifies a single-sex program, the Commonwealth of Virginia has not revealed a policy that explains why it offers the unique benefit of VMI's type of education and training to men and not to women. Although it is readily apparent from the evidence that the rigor of the physical training at VMI is tailored to males, in the context of a single-sex female institution, it could be adjusted without detrimental effect. No other aspect of the program has been shown to depend upon maleness rather than single-genderedness.

Virginia has committed the development of its educational policy in the first instance to the State Council of Higher Education for Virginia, but affords each institution of higher learning significant autonomy. See Va. Code Ann. § 23-9.6:1. Moreover, a specific statute reserves control over VMI in the General Assembly. See Va. Code Ann. § 23-92. To oversee and coordinate the several state-supported institutions of higher education, however, the Council of Higher Education is charged with the responsibility of preparing plans, which it has done biennially. These plans articulate "access, excellence and accountability" as an overriding goal of Virginia's system of higher education, and they reaffirm a policy of *autonomy and diversity* to provide a variety of choice. The Council's plans also urged a continuing effort of coordination among the state's public and private institutions to avoid duplication and expense.

Announcing a similar policy, a special commission legislatively established to chart the future goals of higher education in Virginia, the Commission on the University of the 21st Century, reported to the Governor and the

General Assembly of Virginia in 1990 that the hallmarks of Virginia higher education, "autonomy and diversity," should be maintained. Within its report, the Commission indirectly reaffirmed the earlier stated policy of affording broad access to higher education in Virginia, and also observed:

Because colleges and universities provide opportunities for students to develop values and learn from role models, it is extremely important that they deal with faculty, staff, and students *without regard to sex, race, or ethnic origin*.

(Emphasis added.) That statement is the only explicit one that we have found in the record in which the Commonwealth has expressed itself with respect to gender distinctions. Our inability to find a stated policy justifying single-sex education in state-supported colleges and universities is confirmed by the Virginia Attorney General's statement about the absence of such a state policy: "In the *absence* of a statute explicitly expressing the General Assembly's view on the policy issue, [the Governor's] statement of the Commonwealth's policy [that 'no person should be denied admittance to a State supported school because of his or her gender'] is persuasive." (Emphasis added.)

The lack of a state-announced policy to justify gender classifications is aggravated by the reluctance of the Commonwealth, as a party, and its governor to participate in this case and in this appeal. To the extent that the Governor's view represents state policy, VMI's single-sex admissions policy violates state policy.

If VMI's male-only admissions policy is in furtherance of a state policy of "diversity," the explanation of how the policy is furthered by affording a unique educational benefit only to males is lacking. A policy of diversity which aims to provide a array of educational opportunities, including single-gender institutions, must do more

than favor one gender. Moreover, if responsibility for implementing diversity has somehow been delegated to an individual institution, no explanation is apparent as to how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions.

On a more empirical level, we have been given no explanation for the movement away from gender diversity in Virginia by public colleges and universities. At one time most of Virginia's institutions of higher learning were single-sex, including four all-female institutions. Today, all but VMI are coeducational. If VMI thus remains male in furtherance of the state's policy of diversity, which includes diversity in gender, did the decisions of the other institutions violate state policy by moving uniformly to coeducation? At most, VMI could argue that the policy of institutional autonomy in establishing admissions requirements produces a diversity by virtue of the individual random decisions of its 15 institutions. But that randomness has fortuitously resulted in 14 coeducational institutions and VMI, an all-male institution.

In short, VMI has adequately defended a single-gender education and training program to produce "citizen soldiers," but it has not adequately explained how the maintenance of one single-gender institution gives effect to, or establishes the existence of, the governmental objective advanced to support VMI's admissions policy, a desire for educational diversity.

V

We are thus left with three conclusions: (1) single-gender education, and VMI's program in particular, is justified by a legitimate and relevant institutional mission which favors neither sex; (2) the introduction of women at VMI will materially alter the very program in which women seek to partake; and (3) the Commonwealth of Virginia, despite its announced policy of diver-

sity, has failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women.

Although neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women, the Commonwealth has elected, through delegation or inaction, to maintain a system of education which offers the program only to men. In the proceedings below, Virginia had the opportunity to meet its burden of demonstrating that it had made an important and meaningful distinction is perpetuating this condition. See *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981). As the record stands, however, evidence of a legitimate and substantial state purpose is lacking.

In light of our conclusions and the generally recognized benefit that VMI provides, we do not order that women be admitted to VMI if alternatives are available. But VMI's continued status as a state institution is conditioned on the Commonwealth's satisfactorily addressing the findings we affirm and bringing the circumstances into conformity with the Equal Protection Clause of the Fourteenth Amendment. By commenting on the potential benefits of single-gender education while discussing the alleged governmental interest in support of VMI's admissions policies, we do not mean to suggest the specific remedial course that the Commonwealth should or must follow hereafter. Rather, we remand the case to the district court to give to the Commonwealth the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied. Consistent therewith, the Commonwealth might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution. While it is not ours to determine, there might be other more creative options or combinations.

Accordingly, we vacate the judgment and remand the case to the district court: (1) to require the defendants to formulate, adopt, and implement a plan that conforms with the Equal Protection Clause of the Fourteenth Amendment, (2) to establish appropriate timetables, and (3) to oversee the implementation of the plan.

**VACATED AND REMANDED
FOR FURTHER PROCEEDINGS**

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

Civil Action No. 90-0126-R

UNITED STATES OF AMERICA,
Plaintiff,

v.

COMMONWEALTH OF VIRGINIA, *et al.,*
Defendants.

[Filed June 14, 1991]

ORDER

Between April 4 and April 11, 1991, this Court held a nonjury trial limited to the issue of liability in the above-styled case. For reasons explained in the accompanying Memorandum Opinion, it is hereby ADJUDGED and ORDERED that judgment is entered in favor of defendants.

The Clerk is directed to send a certified copy of this Order to all counsel of record and to strike this case from the active docket of this Court.

ENTER this 14th day of June, 1991.

/s/ Jackson L. Kiser
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 90-0126-R

UNITED STATES OF AMERICA,
Plaintiff,
v.

COMMONWEALTH OF VIRGINIA, *et al.,*
Defendants.

[Filed June 14, 1991]

MEMORANDUM OPINION¹

By: Jackson L. Kiser, Judge
United States District Court

The Controversy

It was in May of 1864 that the United States and the Virginia Military Institute (VMI) first confronted each other. That was a life-and-death engagement that occurred on the battlefield at New Market, Virginia. The combatants have again confronted each other, but this time the venue is in this court. Nonetheless, VMI claims the struggle is nothing short of a life-and-death confrontation—albeit figurative.

The conflict between the parties arises out of the United States' challenge to VMI's all-male admissions

¹ Detailed findings of fact are set forth in the Appendix to this Memorandum Opinion, portions of which will be referred to throughout the Opinion.

policy. The United States asserts that as a state-supported college, VMI's refusal to admit females to the Institute, regardless of their qualifications, violates the Equal Protection Clause of the Fourteenth Amendment. VMI counters by saying that although it discriminates against women, the discrimination is not invidious but rather to promote a legitimate state interest—diversity in education. Thus, the issue to be resolved is whether VMI's practice of excluding women can pass muster under the equal protection clause, as glossed by the decisions of the Supreme Court. I find that it can, for the reasons that I hereafter state.

Jurisdiction

This Court's jurisdiction was properly invoked under Title IV of the Civil Rights Act, 42 U.S.C. 2000c-6, which permits the United States to bring actions alleging discrimination in violation of either the United States Constitution or other federal statutes.

Because single-sex colleges and single-sex military schools are exempted from Title IX of the Civil Rights Act, 20 U.S.C. 1681(a)(4) and (5), the United States alleged only a constitutional violation and no statutory violation. The Department of Justice's authority to bring a suit under Title IV is not limited by Title IX. *United States v. Massachusetts Maritime Academy*, 762 F.2d 142, 147-51 (1st Cir. 1988). Of course, although Congress could deprive the Attorney General of the authority to bring this action, it could not pass a statute that would exempt VMI's alleged equal protection violations from judicial review. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 733 (1982).

Procedural Background

This case originated from a complaint filed by the United States Department of Justice on behalf of a female high school student who wanted to be considered

for admission to VMI. The named defendants were the Commonwealth of Virginia; Governor Lawrence Douglass Wilder; Virginia Military Institute, its president, superintendent, and members of its Board of Visitors; and Virginia's State Council of Higher Education and its members. The State Council of Higher Education and its members have been dismissed from the suit. The Commonwealth has been granted a stay relieving it of the duty to appear at trial, under the condition that it be bound by any ruling of this Court. Governor Wilder was relieved of the duty to respond to any subpoenas requiring him to testify at trial. In response to an earlier motion, he stated that he did not oppose entry of summary judgment against himself and the other defendants. The VMI Foundation and the VMI Alumni Association, private organizations associated with VMI, have intervened as defendants in the case over the United States' objection. See ruling of November 27, 1990.

A six-day trial was held beginning April 4, 1991. Nineteen witnesses testified, including four experts on education, one expert on college facilities, and one expert on human physiology. All defendants, except Governor Wilder, were represented by common counsel. Governor Wilder was represented by counsel, but he did not personally appear or participate in the trial.

Standard of Review

The VMI Board of Visitors decides the admissions policy of VMI. The seventeen members of this Board are appointed by the Governor of Virginia, subject to approval by the General Assembly, including the State Adjutant General, who is a member *ex officio*. Va. Code § 23-93; Va. Code § 44-11 (Adjutant General also nominated by Governor subject to General Assembly approval). Twelve of the members must be VMI alumni.

All parties recognize that this case concerns educational policy, and the proper standard of review should

be derived from cases concerning higher education. The principle of academic freedom, an aspect of the freedom of association guaranteed by the First Amendment, has been recognized by the Supreme Court as a reason to defer to academic decisionmaking by a university. *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978).² The essential freedoms of a university include the freedom to choose who may be admitted to study. *Id.* (Quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Justice Frankfurter concurring)). "[A]ttainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education." *Id.* While *Bakke* involved diversity within a single graduate program,³ other courts have extended the rationale of that decision to include the freedom to create different missions at different state universities, in order to promote diverse educational opportunities within the state. *Williams v. McNair*, 316 F. Supp. 134, 137 (D.S.C. 1970) (three-judge panel), *aff'd*, 401 U.S. 951 (1971) (per curiam); *Ayers v. Allain*, 914 F.2d 676, 687 (5th Cir. 1990 *en banc*), *cert. granted sub nom. United States v. Mabus*, 59 U.S.L.W. 3695 (April 15, 1991).

However, deference to university decisions is not absolute. The Supreme Court ordered racial integration of graduate programs long before it ordered desegregation of lower public schools. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Board of Regents*,

² However, this is not the same degree of deference as is accorded Congress in matters of national defense. See *Roatker v. Goldberg*, 453 U.S. 57, 64-67 (1981).

³ In *Bakke*, the University of California attained racial diversity by reserving a number of openings in its medical school for minorities. Because of that quota system, Bakke was denied admission. It seems to me that a policy which denies admission based on a quota system does not differ in principle, but only in degree of restrictiveness, from a policy which totally restricts admission of an identifiable class.

332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). Courts have, in some cases, entered injunctions that have the effect of overruling discretionary educational decisions of individual colleges, where those decisions tend to perpetuate unconstitutional discrimination. In *Board of Visitors of the College of William & Mary v. Norris*, 327 F. Supp. 1368 (4th Cir.), *aff'd*, 404 U.S. 907 (1971), a three-judge panel of the Fourth Circuit entered an injunction preventing Richard Bland College, a two-year branch of the College of William and Mary, from expanding into a four-year college, because that would have impeded desegregation of nearby Virginia State College.

Sex Discrimination

The first court challenge to sex segregation in Virginia higher education appeared in *Kirstein v. Rector and Visitors of the University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970) (three-judge panel) (approving consent order). In that case, the court found that "we think it fair to say from the evidence that the most prestigious institution of higher education in Virginia is the University of Virginia in Charlottesville." *Id.* at 186. The court was reluctant to "interfere with the internal operation of any Virginia college or university," but it encouraged a settlement that required the university to admit women. But the court refused to enter an order requiring Virginia to admit both sexes to all of its universities:

We are urged to go further and to hold that Virginia may not operate any educational institution separated according to the sexes. We decline to do so. Obvious problems beyond our capacity to decide on this record readily occur. One of Virginia's educational institutions is military in character. Are women to be admitted on an equal basis, and, if so,

are they to wear uniforms and be taught to bear arms?

Id. at 187.

Another early Fourth Circuit decision, affirmed by the Supreme Court, involved Winthrop College in Rock Hill, South Carolina. *Williams v. McNair*, *supra*. In that case, male students wanted to attend an all-female college. The Court noted that South Carolina had one public all-male college (The Citadel, which like VMI offers a military program), and several coeducational institutions. The court noted,

It is conceded that recognized pedagogical opinion is divided on the wisdom of maintaining "single-sex" institutions of higher education but it is stipulated that there is a respectable body of educators who believe that "a single-sex institution can advance the quality and effectiveness of its instruction by concentrating upon areas of primary interest to only one sex."

316 F. Supp. at 137. Unlike *Kirstein*, there was no feature of Winthrop College other than its single-sex status that made it distinctive, and the plaintiffs' interest in attending college in the town where they lived was found to be less than compelling. The denial of admission to them was not an equal protection violation.⁴

Hogan, *supra*, guides my decision in this case. In *Hogan*, the Supreme Court conducted a factual inquiry into the justification for the policy of the Mississippi University for Women of allowing men to audit courses in the nursing program, but not granting them academic credit. It concluded that the policy denied equal protec-

⁴ This reasoning was adopted by Justice Powell in dissent in *Hogan*, 458 U.S. at 736 ("There is, of course, no constitutional right to attend a state-supported university in one's home town").

tion to the plaintiff, who wished to earn credit for advanced nursing courses at the school.

The *Hogan* court applied the "intermediate scrutiny" test:

[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an exceedingly persuasive justification for the classification. The burden is met only by showing at least that the discrimination serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.

Hogan, 458 U.S. at 730 (citations and punctuation omitted).⁵ Where a state offers an educational opportunity to only one gender,

The issue is not whether the benefitted class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.

Id. at 731 n.17.

Finally,

[a]lthough the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory ob-

⁵ This is the "intermediate judicial scrutiny" test, now universally employed in sex discrimination cases based on the equal protection clause. The test originated in *Craig v. Boren*, 429 U.S. 190 (1976), and so had not been applied in *Kirstein* or *Williams*. G. Gunther, *Constitutional Law* 647 n.3 (11th ed. 1985).

jective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.

Id. at 724-25.

Hogan involved admission of a single student into the nursing school, and the Court did not purport to extend its ruling to cover other programs at the school. *Id.* at 733 (Chief Justice Burger dissenting). These determinations require a fact-intensive examination of the practical considerations underlying the challenged policy.

Many of the facts underlying the Supreme Court's rejection of the justification proffered in *Hogan* are not present here. In *Hogan*, Justice O'Connor's majority opinion emphasized that the

uncontroverted record reveals that admitting men to nursing classes does not affect teaching style, . . . that the presence of men in the classroom would not affect the performance of the female nursing students, . . . and that men in coeducational nursing schools do not dominate the classroom. . . . In sum, the record in this case is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of MUW's educational goals.

Hogan, 458 U.S. at 731.⁶ The record in this case is directly to the contrary. The record is replete with testimony that single gender education at the undergraduate level is beneficial to both males and females. Moreover,

⁶ The procedural posture of *Hogan* at the Supreme Court may explain why the evidence was uncontroverted. Mississippi University for Women won at the district court level on summary judgment.

the evidence establishes that key elements of the adversative VMI educational system, with its focus on barracks life, would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were forced to admit females and to make changes necessary to accommodate their needs and interests.

One of the most striking differences in the two cases is the reasons proffered to justify the discrimination. In *Hogan*, Mississippi maintained that a female-only admission policy at MUW was affirmative action which was justified to compensate women for past discrimination whereas, here, Virginia urges that a male-only admission policy at VMI promotes diversity within its statewide system of higher education. The Court found that Mississippi's proffered explanation failed both prongs of the intermediate scrutiny test, i.e., that it was not an important governmental objective and that the means of advancing the objective were not substantially related to the achievement of that objective. In contrast, diversity in education has been recognized both judicially and by education experts as being a legitimate objective. The sole way to attain single-gender diversity is to maintain a policy of admitting only one gender to an institution.

I also note that the plaintiff in *Hogan* was a resident of the town where Mississippi University for Women was located. He would have had no opportunity to study his chosen profession (nursing) within commuting distance of his home if he could not attend that school, and moving to a different community would have presented him with a significant hardship. *Id.* at 735 n.1 (Justice Powell dissenting). VMI does not offer an advantage of close-to-home education to any students, male or female, because it requires all cadets to live on campus for all four years of college. Finding III.F.1. The night and Summer courses, which do serve commuting students, are open to both men and women. Findings I & III. Nor does its policy deny the opportunity to study any par-

ticular academic program to anyone, because all of the same courses, including military instruction, are available at VPI. Finding III.H.2.

Single-sex Education is a Constitutionally Legitimate Form of Diversity

A substantial body of "exceedingly persuasive" evidence supports VMI's contention that some students, both male and female, benefit from attending a single-sex college. Finding VII.B. For those students, the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement. Finding VII.B.10. Astin, *Four Critical Years* (1977). Most importantly, Dr. Conrad, the United States' expert witness on higher education, called himself a "believer in single-sex education." Finding VII.B.7. He believed that single-sex education should be provided only by the private sector, because he also believes that public institutions should be open to all citizens to the extent possible. He concedes that his public/private dichotomy is a personal, philosophical preference rather than one born of educational-benefit considerations. An opinion based on equity rather than appropriate educational methods is entitled to little weight. Finding VII.B.7.⁷ *Rostker*, 453 U.S. at 79-81.

One empirical study in evidence, not questioned by any expert, demonstrates that single-sex colleges provide better educational experiences than coeducational institutions. Students of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience (the

⁷ VMI, like all of the colleges in Virginia, also has academic requirements for admission, including high school graduation, class rank, and Scholastic Aptitude Test performance, that effectively exclude many male candidates from the college. This kind of limitation on access apparently did not trouble Dr. Conrad.

sole exception is social life) compared with their counterparts in coeducational institutions. Attendance at an all-male college substantially increases the likelihood that a student will carry out career plans in law, business and college teaching, and also has a substantial positive effect on starting salaries in business. Women's colleges increase the chances that those who attend will obtain positions of leadership, complete the baccalaureate degree, and aspire to higher degrees. Alexander Astin, *Four Critical Years*, (1977); VMI Ex. 73I; Finding VII.B.10. This research was cited favorably by Justice Powell in his dissenting opinion in *Hogan*, 458 U.S. at 738-39. Viewed in the light of this very substantial authority favoring single-sex education, the VMI Board's decision to maintain an all-male institution is fully justified even without taking into consideration the other unique features of VMI's method of teaching and training.

Openness and equal treatment by public institutions is a valid legislative goal, but legislators or other decision-makers may also take other goals into account, even when adopting a policy that discriminates on the basis of sex. *Id.* The VMI Board has decided that providing a distinctive, single-sex educational opportunity is more important than providing an education equally available to all.

Effect of Coeducation at VMI

When one considers VMI's methods of education and the effect that admission of women into the institution will have, the Board's decision to remain an all-male institution is further reinforced. Expert testimony established that, even though some women are capable of all of the individual activities required of VMI cadets, a college where women are present would be significantly different from one where only men are present. This is true for a variety of reasons discussed more fully in the Findings of Fact. See Findings VIII.D-J. In addition

to converting VMI from a single-gender institution to a coeducational institution, changes in methods of instruction and living conditions would occur.

As West Point's experience in converting to coeducation bears out, the presence of women would tend to distract male students from their studies. It would also increase pressures relating to dating, which would tend to impair the *esprit de corps* and the egalitarian atmosphere which are critical elements of the VMI experience. Finding VIII.H.

Allowance for personal privacy would have to be made. Doors would have to be locked, and the windows on all of the doors would have to be covered. This would alter the adversative environment that VMI students must now endure. Finding VIII.D.

Physical education requirements would have to be altered, at least for the women. The current program, where every student must pass precisely the same physical test before graduation, would prevent a disproportionate number of women from graduating, thus forcing VMI either to establish different requirements for women, or to eliminate or substantially reduce the requirements so that they could be applied to both sexes, which would remove one important part of the VMI system of education. Finding VIII.E-G.

The introduction of women into VMI would add a new set of stresses on the cadets, of a very different kind than the cadets now face. The belief that this would affect the educational program is well-founded in empirical evidence, and not based on an archaic stereotype. Finding VIII.1; *Williams, supra*; *Vorthheimer v. School Dist. of Philadelphia*, 532 F.2d 880, 882 (3d Cir. 1976), *aff'd by an equally divided court*, 430 U.S. 703 (1977); see also Justice Powell's dissenting opinion in *Hogan*, 458 U.S. at 735-46.

Dr. Riesman testified that the adversative model of education is simply inappropriate for the vast majority of women. He felt that if VMI were to admit women, it would eventually find it necessary to drop the adversative system altogether, and adopt a system that provides more nurturing and support for the students. Evidence supports this theory, including the West Point experience.⁸ Dr. Conrad argued that some women will thrive in the adversative environment, and drastic changes in that aspect of the education will not be necessary. But as Dr. Richardson pointed out, educational systems are not designed for the exception but for the mean. Finding VII.B.1. The changes, which all parties agreed would occur, provide sufficient constitutional justification for continuing the single-sex policy.

The United States has asserted that VMI's decision to continue its single-sex policy in 1986, based on the report of its advisory committee, was not based on "reasoned analysis" or on the evidence before it. It is clear that the Committee met with some advocates of coeducation, and that it rejected their recommendations. However, the committee members also had considerable experience in higher education, as well as intimate knowledge of the VMI program.⁹ The more thorough self-

⁸ The United States urges that the success at West Point in assimilating women into the institution is proof that VMI could do likewise. Without a doubt, VMI could do likewise, but it is equally without a doubt that VMI's present methods of training and education would have to be changed as West Point's were.

⁹ Although *Hogan* requires that a state policy of sex discrimination be based on a "reasoned analysis," it does not suggest how a court should review the analysis. 458 U.S. at 726. I understand *Hogan* to require me to consider the constitutionality of VMI's policy *de novo*, according only such weight to the state's analysis as appears appropriate. However, I am not to substitute my judgment for that of the Board of Visitors as if I were the primary decisionmaker. *Rostker*, 453 U.S. at 70. My conclusions are based on evidence submitted at trial, and are not limited to the 1986 Mission Study Report.

study undertaken by VMI as part of its accreditation by the Southern Association of Colleges and Schools demonstrates that VMI has applied reasoned analysis to all of its policies, including admissions. The Board of Visitors had available to it a substantial amount of "reasoned analysis" when it considered admissions policy.

I find that both VMI's single-sex status and its distinctive educational method represent legitimate contributions to diversity in the Virginia higher education system, and that excluding women is substantially related to this mission. The single-sex status would be lost, and some aspects of the distinctive method would be altered if it were to admit women. VMI has, therefore, met its burden under *Hogan* of showing a substantial relationship between the single-sex admission policy and achievement of the Commonwealth's objective of educational diversity.

Of What are Women Deprived

Trial testimony established that VMI's military program is absolutely unique. No other school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI. The military and academic courses are available to women at VPI, but without the intensity of the barracks-centered lifestyle that makes VMI so attractive to many applicants, and so important to its graduates. Finding V.17.

It has been established that if VMI were to admit women, it would become more similar to the military barracks at VPI, so its uniqueness would be lost. Even if this were to occur, VMI would remain the only small college campus in Virginia offering a military program. A woman who wished to live in a military barracks, but preferred a campus of 1,300 students over one of 18,000, would benefit from the availability of VMI.

Considerable speculation, but very little evidence, was presented on the question of whether there would be any demand for a VMI education among women. Because VMI and VMI alumni direct their recruitment efforts only at men, it cannot be precisely determined how much demand their might be among women. Based on the experience at West Point, as well as VMI's experience recruiting black applicants, I conclude that some women, at least, would want to attend the school if they had the opportunity. *Hogan* seems to teach that the court must consider the constitutionality of the policy without regard to the size of the available applicant pool. The Department of Justice filed this suit on behalf of a potential applicant, and that is all that is required to test the constitutionality of VMI's admissions policy.

Absence of Comparable Opportunity for Women

Ironically, although much of the testimony at trial concerned the ways that men and women are different, my ruling is based on a trait that men and women share: Both men and women can benefit from a single-sex education. Indeed, it appears that demand for single-sex education is greater among women, and that the beneficial effects of single-sex education are stronger among women than among men. Finding II.B.3-4.

Gender discrimination, as a rule, works to the benefit of one group and to the detriment of another. But in a real sense of the word, that is not true in this case because, as the testimony of experts demonstrates, it would be impossible for a female to participate in the "VMI experience." Even if the female could physically and psychologically undergo the rigors of the life of a male cadet, her introduction into the process would change it. Thus, the very experience she sought would no longer be available. Consequently, it seems to me that the criticism which might be directed toward Virginia's higher educational policy is not that it maintains VMI as an all-

male institution, but rather that it fails to maintain at least one all-female institution.¹⁰ But this issue is not before the Court.

The relief that the United States seeks in this suit is to require VMI to open its doors to women—not to force Virginia to establish an all-female, state-supported college. *Cf. Milliken v. Bradley*, 418 U.S. 717 (1974) (federal court could not exercise jurisdiction over school districts that had not practiced unconstitutional racial segregation in order to achieve racial balance in another school district). This aspect of the case is very similar to *Hogan* in that *Hogan* did not mount a constitutional challenge because there was no corresponding all-male counterpart to the MUW Nursing School but only sought admission to the MUW program. The Court was careful to tailor its decision to the relief sought. Thus, whether Virginia can continue to rely upon private colleges to supply single-gender education to females or whether it must operate a state-supported, all-female college is not an issue to be resolved in this lawsuit.

Conclusion

In 1970, a three-judge panel of the Fourth Circuit observed that:

The trend in this country is away from the operation of separate institutions for the sexes, but there is still a substantial number of private and public institutions, which limit their enrollment to one sex and do so because they feel it offers better educational advantages. While history and tradition alone may not support a discrimination, the Constitution

¹⁰ This situation is *not* the result of a long-standing discriminatory policy, but a recent development. In 1839, the same legislative session that founded VMI also incorporated the Farmville Female Seminary Association. The Farmville Female Seminary was made a public institution in 1884. Finding II.2. In addition, Mary Washington, Radford and Madison Colleges were state-supported, all-female colleges until the late 1960's.

does not require that a classification "keep abreast of the latest" in educational opinion, especially when there remains a respectable opinion to the contrary[.]

Williams, 316 F. Supp. at 137.

Through its Board of Visitors at VMI, Virginia has set an objective of providing single-gender education for males. The evidence in the case, which is virtually uncontradicted, supports Virginia's view that substantial educational benefits flow from a single-gender environment, be it male or female, that cannot be replicated in a coeducational setting. This adds a measure of diversity to Virginia's overall system of education that would be missing if VMI were coeducational. The diversity is further enhanced by VMI's unique method of instruction which was applauded by all of the educational experts who testified. Thus, Virginia has sustained the requirement that gender discrimination serves an important state educational objective.

Virginia also met the second prong of the *Hogan* test by proving that the objective of diversity of education is met by providing single-gender education. Obviously, the only means of attaining this goal is to exclude women from the all-male institution—VMI. But Virginia did not stop there. It enlarged on the single-gender diversity by maintaining an institution whose method of instruction is unique in all the world.

VMI is a different type of institution. It has set its eye on the goal of citizen-soldier and never veered from the path it has chosen to meet that goal. VMI truly marches to the beat of a different drummer, and I will permit it to continue to do so.

The Clerk is directed to send a certified copy of this Memorandum Opinion to all counsel of record.

/s/ Jackson L. Kiser
United States District Judge

APPENDIX C

APPENDIX: FINDINGS OF FACT *

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I. WITNESSES

Testimony of the following witnesses, together with stipulations and exhibits supplied the evidence from which these Findings of Fact are made:

A. Expert Witnesses

1. Dr. Clifton Conrad testified as the United States' expert witness on education. He is currently Professor of Higher Education and Coordinator of the doctoral program in Higher Education at the University of Wisconsin-Madison, and previously had been on the faculties of the University of Denver, the College of William and Mary, and the University of Arizona. He holds a Bachelor's Degree from the University of Kansas and a Ph.D. in higher education from the University of Michigan. His scholarship has focused on academic programs in higher education. His books and monographs include *The Undergraduate Curriculum* (1978), *Liberal Education in Transition* (1980, with Jean Wyer), and *Curriculum in Transition: Perspectives on the Undergraduate Experience* (1990, with Jennifer Haworth). In 1987-88, he served as president of the Association for the Study of Higher Education. He has testified in several other desegregation cases involving higher education on behalf of the United States. U.S. Ex. 160.

2. Mr. James Francis Brewer, III testified as the United States' expert witness on physical facilities. He has been Director of Physical Plant at the University of Maryland at College Park since 1985. He holds B.S. and M.B.A. degrees from the University of Maryland. U.S. Ex. 161.

3. Dr. Richard C. Richardson, Jr. testified as one of VMI's experts on educational institutions. He is Professor of Educational Leadership and Policy Studies at Arizona State University. He holds a B.S. degree in education from Castleton State College, an M.A. from Michigan State University, and a Ph.D. from the Uni-

versity of Texas. After earning his Bachelor's Degree, he served in the Marine Corps for three years, from 1954 to 1957. He taught at a single-sex (women's) college, Vermont College, from 1958 to 1961, and has both professional and administrative experience at several colleges and community colleges. His publications include *Achieving Quality and Diversity: Universities in a Multicultural Society* (with E.F. Skinner, 1991), and *Fostering Minority Access and Achievement in Higher Education: The Role of Urban Community Colleges and Universities* (with L.W. Bender, 1987). He has previously testified on behalf of the United States in discrimination lawsuits involving higher education. He has served as chair of at least 25 different evaluation teams on behalf of regional higher education accreditation boards, including one team that evaluated West Point. His research in the past 10 years has focused on "the impact of students on colleges and the impact of colleges on students." Tr. 661-66.

4. Dr. David Riesman, a professor of sociology at Harvard University, testified as a VMI expert on education. He holds a bachelor's degree from Harvard College earned in 1931, and a law degree from Harvard Law School earned in 1934. After completing a year of postgraduate study, he served as a law Clerk to Justice Brandeis at the United States Supreme Court. He held a teaching post at Buffalo School, and then spent a year as a research fellow at Columbia Law School studying sociology and anthropology. He joined the faculty at the University of Chicago in 1946, and returned to Harvard on the faculty in 1958. His publications include *The Lonely Crowd* (1950), *Constraint and Variety in American Education* (1956), *The Academic Revolution* (with Christopher Jencks 1968), and *On Higher Education: The Academic Enterprise in an Era of Rising Student Consumerism* (with several collaborators 1980). Because he was unable to travel, he appeared only on videotape produced at a *de bene esse* deposition.

5. Josiah Bunting, III, testified as another VMI expert on educational institutions. Since 1987, he has served as Head Master of The Lawrenceville School, a private preparatory school in New Jersey that changed from all-male to coeducational during his tenure. He graduated from VMI in 1963, and won a Rhodes Scholarship and earned an M.A. at Oxford. He served in the United States Army from 1966 to 1972, serving in the infantry, and as Assistant Professor at West Point. From 1972 to 1973 he was Professor and Acting Head of the U.S. Naval War College. From 1973 to 1977, he served as President of Briarcliff College, then an all-female college. From 1977 to 1987, he was president of Hampden-Sydney College, an all-male private college.

6. Dr. Paul Davis testified as VMI's expert on human physiology. He holds a bachelor's degree from Columbia Union College, and earned a master's degree in physical education from the University of Maryland, and a Ph.D. from the University of Maryland College of Health and Human Performance, Department of Kinesiology, with a major in exercise physiology and a minor in research design and statistics. He has taught physical education to both sexes at the elementary school, junior high school and high school levels, and taught applied physiology at the University of Maryland. He has done extensive consulting for the United States Armed Forces on the development of physical training programs for both men and women. Tr. 879-84.

B. Fact Witnesses

1. General John William Knapp is the Superintendent of VMI. He graduated from VMI in 1954, holds a Ph.D. from Johns Hopkins University, and has been a professor or administrator at VMI since 1959. He was Dean of Faculty from 1984 to 1989, when he was promoted to superintendent. Tr. 28-30.

2. Colonel Norman M. Bissell is the Commandant of Cadets at VMI, a position comparable to Dean of Students at another college. He graduated from VMI in 1961, and received a master's degree from the University of Missouri in 1984. He was on active duty in the United States Army from 1961 to 1987, and returned to VMI in 1990. Tr. 95-96.

3. Lieutenant Colonel Mark Steven Sandy is the director of admissions at VMI. He holds a B.S. from Concord College, and has a master's degree in education administration from Lynchburg College. He assumed his current post in 1988.

4. Colonel Ronald Walker Williams is Professor of Aerospace Studies at VMI. He graduated from VMI in 1964 and earned a master's degree from Golden Gate University in 1985. He has been on active duty with the Air Force for the past 25 years, and has been posted at VMI by the Air Force for a three year assignment in 1988. He teaches the Air Force ROTC courses at VMI. Tr. 213-14.

5. Colonel William A. Randall is a professor of military science at the University of Virginia, where he is completing a three-year assignment. He holds a B.A. degree from Auburn University and a master's degree from Duke University. He has been on active duty in the military since 1966. Tr. 243-44.

6. Colonel Rutherford Dean Stickell is Professor of Aerospace Studies and Chairman of the Air Force ROTC program at the University of Virginia. He holds a bachelor's degree from The Citadel, and a master's degree from the University of Southern California, and has been in the military for over 20 years.

7. Joseph M. Spivey, III, is Chairman of the Board of Visitors of VMI. He holds a bachelor's degree from VMI and a law degree from Washington & Lee University. He was admitted to the Virginia bar in 1962, and

is a practicing attorney. He was appointed to the VMI Board of Visitors in 1983 and has been chairman since 1987. Tr. 275-76.

8. Dr. Clark King is the head of the Physical Education Department at VMI, and director of the continuing education programs, including both the night and the summer programs. He holds a bachelor's degree from Kearney State College and a doctorate from the University of Virginia. He has been associated with VMI since 1952, and has been chair of physical education since 1963. Tr. 292-94.

9. Major General Stanton R. Musser is Commandant of Cadets at Virginia Polytechnic Institute State University. He holds a bachelor's degree from Gettysburg College, and a master's degree from Central Michigan University. He served in the United States Air Force from 1958 to 1989, and accepted his current position upon retirement. Tr. 441-42.

10. Colonel Patrick Toffler is Director of the Office of Institutional Research (OIR), at the United States Military Academy ("West Point"). He graduated from West Point in 1968, and holds a master's degree from the Naval postgraduate school. The function of the OIR "Is to assess the degree to which [West Point] is successful in realizing its purpose, accomplishing its mission, achieving its outcome goals, and to assist the major decisionmakers in the conduct of their duty." The Office prepares reports on aspects of the West Point programs and Colonel Toffler comes into contact with all of the West Point constituencies. Tr. 478-81.

11. Colonel John Walter Ripley is the commanding officer of the Navy and Marine ROTC programs at VMI. He joined the Marine Corps directly after high school, and then received a fleet appointment to the Naval Academy, from which he graduated in 1962. He also holds a Master's Degree from American University. He has been

an active-duty marine for over thirty years, and his service includes teaching appointments at Oregon State University and the Naval Academy prior to his current duty at VMI. Tr. 814-16.¹

II. PUBLIC HIGHER EDUCATION IN VIRGINIA

1. There are fifteen state-supported four-year colleges in the Commonwealth of Virginia:

Christopher Newport College
Clinch Valley College
College of William and Mary
George Mason University
James Madison University
Longwood College
Mary Washington College
Norfolk State University
Old Dominion University
Radford University
University of Virginia
Virginia Commonwealth University
Virginia Military Institute
Virginia Polytechnic Institute and
State University
Virginia State University

Stipulation 126.

2. Historically, most of Virginia's public colleges were single-sex. Four colleges were originally limited by statute to women only. Mary Washington College, legislatively founded in 1908, became coeducational in 1970. Radford University, founded in 1910, became coeducational in 1972. Longwood College, founded as Farm-

¹ Testimony was also received from Commander Paul Galanti, a retired Navy Recruiting Officer. General James Morgan Dean of Faculty Emeritus of VMI, and Colonel Paul Maini, Executive Director of the VMI Alumni Association. This testimony did not contribute to the findings of fact.

ville Female Seminary Association in 1839 and converted into a public institution in 1884, began a diversification program that led to the admission of men in 1949.² James Madison University, founded in 1908, became coeducational in 1966. Stipulation 111; 1839 Va. Acts ch. 167; 1884 Va. Acts ch. 311.

3. On the men's side, the University of Virginia first admitted women only after its single-sex policy was attacked in court. *Kirstein v. Rector and Visitors of the University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970). Virginia Tech was also originally male only.

4. All public colleges in Virginia, except for the Virginia Military Institute, are now coeducational. Thus, Virginia has one all-male public institution and no all-female colleges.

5. In the Fall of 1989, enrollment at the 15 public institutions included 72,819 men and 85,441 women. Stipulation 113. Of that number, 1312 (all men) are enrolled at VMI. VMI is substantially smaller than all of the colleges in the system except for Clinch Valley College, which has a very different mission.

6. Virginia offers a diverse array of educational opportunities through the decisions of the respective autonomous governing boards of Virginia's colleges and universities, public and private. The State Council of Higher Education's current plan for higher education states that "Virginia has always recognized that there are many kinds of excellence and has supported a diversity of missions among its institutions of higher education." Stipulation 108.

7. The Boards of Visitors of the various public colleges and universities in Virginia have traditionally en-

² The stipulation does not state when Longwood first admitted men. The court in *Kirstein v. Rector and Visitors of University of Virginia*, 309 F. Supp. 184, 186 (E.D. Va. 1970), listed Longwood as admitting women only.

joyed, and now enjoy, broad autonomy in the determination of such issues as the institution's mission, curriculum, the composition of its faculty, and the composition of its student body.

8. The 1990 Report of the Commission on the University of the 21st Century to the Governor and the General Assembly of Virginia notes that the hallmarks of Virginia's educational policy are "diversity and autonomy." Stipulation 105. It further states

The formal system of higher education in Virginia includes a great array of institutions: state-supported and independent, two-year and senior research and highly specialized, traditionally black and single sex. Opportunities for fundamental change are open to all. But the sea change being felt in Virginia affects the entire system, and we think that Virginia should encourage creativity and discourage complacency by its method of governing higher education and by financial and other rewards.

Stipulation 106.

9. All expert witnesses agree that Virginia's system of higher education is diverse. Tr. 403 (Conrad); Reisman Dep. 89-91; Tr. 984 (Bunting). The diversity is a consequence of the relatively great autonomy given to the individual Boards of Visitors.

10. All Virginia statutes requiring individual institutions to admit only men or women have been repealed. Whether a university should be single-sex or coeducational is in every case decided by the Board of Visitors of the institution.

A. VMI's Contribution to System-Wide Diversity

1. VMI contributes to the diversity of Virginia's higher education in two related ways: (1) by providing an opportunity for single-sex education, and (2) through

the unique VMI method of character development and leadership training.

2. Institutions of higher education that admit only males contribute greatly to diversity in higher education, and should be preserved. Diversity between different kinds of colleges as well as diverse student bodies at individual colleges is a positive aspect of the American, and the Virginia, higher education system. Reisman Dep. 22, 38-39.

3. Diversity between colleges, and the very high number of colleges, is one of the more striking differences between the American and British higher education systems. Tr. 984 (Bunting)

4. Aside from the unique qualities of the education VMI provides, the Commonwealth of Virginia awards some scholarships, the VMI State Cadetships, exclusively to VMI cadets. During 1990-91, 35 cadets were awarded \$147,104. Defendants' response to plaintiff's third set of interrogatories at 16. A substantial number of private scholarships are also available only to VMI cadets. Women have no opportunity to compete for these scholarships.

5. Dr. Conrad concluded that the diversity of Virginia's higher education would not be diminished were VMI to admit women. He acknowledged, however, that single-sex education is a form of diversity. Tr. 371-74, 381-82.

B. Role of Private Colleges

1. There are five all-female private colleges in Virginia, Randolph-Macon Women's College, Mary Baldwin College, Sweet-Briar College, Hollins College, and Southern Seminary College (which offers only a two year program). There is one private all-male college in Virginia, Hampden-Sidney College. VMI Ex. 74A.

2. In the fall of 1989, 3850 women and 2256 men were enrolled in single-sex institutions of higher education in Virginia. All of the women, and 944 of the men, were enrolled in private institutions. Stip. 114.

3. Nationwide, 11,400 men attend single-sex institutions. Of this number 2,000-3,000 attend The Citadel, a public military college in Charleston, South Carolina; 1,300 attend VMI; and the remainder attend one of nine private institutions. Tr. 675, 724-25 (Richardson). There are about 56 single-sex schools for women, enrolling about 64,000 students. All but one of these are private, the exception being Douglass College in New Brunswick, New Jersey, which shares the campus of the much larger Rutgers University. The Mississippi College for Women remains primarily for women, but is required to admit men to its nursing program. Hogan; Tr. 676, 725 (Richardson).

4. From the above statistics, it would appear that the demand for public higher education in Virginia is slightly greater among women than among men. The demand for single sex education is substantially greater among women than among men, both in Virginia and nationwide. The presence of four all-female private schools in Virginia further indicates that the private sector is providing for that form of education to a much greater extent than it provides for all-male education.

5. No defense witness in this case offered to explain why Virginia provides the option of single-sex public education to men but not to women. This appears to be the consequence of individual decisions by each public college in Virginia to admit men. No evidence was submitted concerning the cost or practicality of creating a new, all-female public college, or of converting an existing college into an all-female institution.

C. *Public Influence on Private colleges*

1. The Virginia Constitution permits the General Assembly to provide loans and other aid to students attending nonpublic institutions of higher education. Va. Const. Art. VIII, § 8; Stipulation 88. Virginia provides this aid through the Tuition Assistance Grant program. Va. Code § 23-38.11 *et seq.*

2. The report of the General Assembly Commission on Higher Education to the General Assembly (Senate Document 19, 1974) states: (a) "Virginia needs the diversity inherent in a dual system of higher education." (b) "Higher education resources should be viewed as a whole—public and private." (c) "Even without state economic aid to private colleges, it is academic and economic waste to permit unwarranted duplication." VMI Ex. 4, at 16.

3. Virginia relies on its independent institutions to offer students choices and meet the educational needs of people in the Commonwealth. Tr. 710 (Richardson). There is substantial voluntary cooperation between the public and private institutions on a variety of programs. VMI Ex. 55.

4. The Boards of Visitors of all of the Virginia public colleges are nominated by the Governor and are subject to confirmation by the State Senate. *See generally* Va. Code § 23. Private colleges face no legal restrictions in how they choose their directors.

5. Aside from the choice of particular college, a significant practical difference for a Virginia resident between attending a public and a private college is that, even with the Tuition Assistance Grant, the private education will be much more expensive.

III. THE UNIQUE VMI EDUCATIONAL METHOD

1. The VMI method conforms generally to an adversative, or doubting, model of education. Physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values are the salient attributes of the VMI educational experience.

2. Some of the defendants initially argued that the VMI experience is available to women in substantially the same form at Virginia Polytechnic Institute State University (VPI). In answer to an early interrogatory, the Commonwealth stated, "There is no unique or special benefit, educational or otherwise, available at VMI which cannot also be obtained elsewhere in Virginia's higher education system." Response of Commonwealth to Second Set of Interrogatories, No. 4. Evidence at trial disproves this contention, which was never asserted by VMI itself. VMI and the military barracks at Virginia Polytechnic Institute are dramatically different institutions that offer dramatically different experiences.

3. The system of education at VMI is not offered elsewhere in the United States. Therefore, women have no opportunity anywhere to gain the benefits of this education. Tr. 139 (Bissell); 373 (Conrad).

4. VMI is sought out by some applicants for admission because it is known to be the most challenging military school in the United States, and because its alumni are exceptionally close to the school. Tr. 206 (Sandy).

A. The Adversative Model

1. The VMI experience is predicated on the importance of creating doubt about previous beliefs and experiences in order to create a mindset conducive to the values VMI attempts to impart. VMI Ex. 58 (Richardson Report) at 22-23.

2. The adversative model has been used by military service and in the English public schools. Tr. 686 (Richardson).

3. The adversative model is not in widespread use in American higher education. Dr. Riesman's writings have criticized the permissiveness of American society and the lack of experiencing stress. Dr. Reisman believes that young people rarely experience difficult physical or intellectual demands. Few young people undergo a truly demanding academic program, and even fewer involve themselves in demanding extramural (i.e., outside of the curriculum) programs. While most colleges and universities make it *possible* for a student to get a good education, many such institutions make it easy for students merely to get by. Riesman Dep. 25-30.

4. Colonel N. Michael Bissell, the Commandant of Cadets at VMI, summarized the educational process at VMI as follows:

I like to think VMI literally dissects the young student that comes in there, kind of pulls him apart, and through the stress, everything that goes on in that environment, would teach him to know everything about himself. He truly knows how far he can go with his anger, he knows how much he can take under stress, he knows how much he can take when he is totally tired, he knows just exactly what he can do when he is physically exhausted, he fully understands himself and his limits and capabilities. Something I think is the mainstay of leadership. I think every VMI man that leaves there knows a great deal about his human capacity to do things under all kinds of duress and stress.

Tr. 803-04; see also Tr. 810-22 (Ripley).

5. All experts agreed that the individual systems comprising the VMI method for leadership and character development must be understood holistically. The individ-

ual systems are integrated into a unified experience through the barracks life. Altering any system will affect the educational experience as a whole. Tr. 690, 707, 758 (Richardson), 993 (Bunting), 780-81 (Bissell), 409 (Conrad).

B. Rat line

1. Entering students at VMI are called "rats" because the rat is "probably the lowest animal on earth." In general, the rats are treated miserably for the first seven months of college. Tr. 102 (Bissell).

2. Behavior that contributes to VMI objectives is rewarded; behavior that detracts is swiftly punished. Both punishment and reward are collective as well as individual. Being punished or rewarded for the sins or accomplishments of brother rats, as well as for one's own, builds a sense of class solidarity in addition to individual responsibility. The rat line is sufficiently rigorous and stressful that those who complete it feel both a sense of accomplishment and a bonding to their fellow sufferers and former tormentors. VMI Ex. 58 (Richardson Report) at 4; Tr. 347-48 (Conrad).

3. The rat line is an extreme form of the adversative model. It challenges all values and all forms of behavior in order to instill the values and behaviors for which VMI exists. Tr. 684-85 (Richardson).

4. Features of the rat line include indoctrination, egalitarian treatment, rituals (such as walking the rat line), minute regulation of individual behavior, frequent punishments, and use of privileges to support desired behaviors. Tr. 685 (Richardson).

5. The rat line is more dramatic and more stressful than Army boot camp or Army basic training. Tr. 785-86 (Bissell). It is comparable to Marine Corps boot camp in terms of both the physical rigor and mental

stress of the experience. Tr. 818 (Ripley), 684 (Richardson).

6. At VMI almost every conceivable kind of behavior is anticipated and prescribed. There are thousands of regulations in place that govern cadet life. Tr. 395 (Conrad).

7. "Motivational activities" including stoop runs, fifteen-minute running and calisthenic events, rifle runs, training marches, and the like, are critical aspects of the rat line. Tr. 348-49 (Conrad).

8. The rat line is a very intense experience. Part of that experience is a tough physical training program that begins during the first 8-10 days that cadets spend on the VMI campus. The rigorous physical training is an important component of the rat system. Tr. 933 (Conrad).

9. Cadets who participate in NCAA sports during the regular school year are excused from the physical parts of rat training during the hours that they are practicing their sport. Tr. 112 (Bissell). Aside from that exception, all rats participate in all aspects of rat training.

10. All VMI cadets experience the rat line. The only time cadets can join the corps at VMI is in August, at the beginning of the school year. If cadets leave after joining, they are not replaced. Tr. 92-93 (Knapp).

C. Class System

1. The class system at VMI is a system of privileges and responsibilities aimed at developing the character and leadership of cadets. Each class has specific responsibilities. The first class, or seniors, are responsible for providing overall leadership, writing the standard operating procedures for the rat line for the following year, supervising the rat breakout, and for being a dyke to a rat. The third class, to cite another example, serves as

disciplinarians to the rats. The class system is a very highly-developed system for cultivating leadership. Tr. 346-48 (Conrad).

2. After the rat line strips away cadets' old values and behaviors, the class system teaches and reinforces through peer pressure the values and behaviors that VMI exists to promote. This occurs within the barracks setting. The class system supplies the constant supervision of cadets, tutoring, and dispensation of privileges to reward desired values and behaviors. Tr. 687 (Richardson).

3. The degree and harshness of the regulations imposed through the class system is possible only through a peer system. Professionals working in the same environment could not duplicate the level of stresses without adverse consequences. Tr. 687-88 (Richardson).

D. *Dyke system*

1. The dyke system is closely linked to the class system, and is the arrangement by which each rat is assigned a first classman as a mentor, called a "dyke." The dyke system provides some relief from the extreme stress of the rat line. Tr. 685 (Richardson).

2. The VMI system of education creates a sense of loyalty to one's brother rats. The dyke system contributes to this sense of loyalty. The dyke system also creates a cross-class bonding and provides a model for leadership and support. Riesman Dep. 43; Tr. 141-42 (Bissell).

E. *Honor Code*

1. The VMI honor code holds that a cadet "does not lie, cheat, steal nor tolerate those who do." The sole penalty for violations of the VMI honor code is expulsion. The VMI honor code dominates all facets of institutional life. It is stringently enforced by an honor court com-

prised of cadets elected from the upper two classes. VMI Ex. 58 (Richardson Report) at 6.

F. *Barracks*

1. Unlike most colleges, where the library is central and the dormitories are peripheral, the most important aspects of the VMI educational experience occur in the barracks. The barracks, therefore, are crucial to the VMI experience. Tr. 683-84 (Richardson). All cadets are required to live in the barracks for all four years at VMI. Tr. 761 (Richardson); VMI Ex. 11 at 11.

2. The barracks are the situs of the inspections, the rat-dyke relationship, administration of the class system, administration of the honor system, and much of the new cadet training, or rat line.

3. The barracks are designed to reduce all cadets to the lowest common denominator, from which the new cadet training system, class system, honor code, military system and academic system year-by-year builds the values, attitudes and behaviors expected from VMI graduates. In the process, upperclassmen exhibit unusual concern and serve as mentors for lower classmen. Producing a VMI graduate without the barracks experience would be equivalent to dressing someone up in the uniform of a Marine without first sending them to boot camp. VMI Ex. 58 (Richardson Report) at 3.

4. The report of the Reaffirmation Committee of the Commission on Colleges for the Southern Association of Colleges and Schools on March 16-19, 1986, observed that "[t]he barracks, VMI's student housing, is the center of campus life and reflects many of the educational objectives of the institution. There is no professional staff living in the barracks but cadets themselves provide support for life there." VMI Ex. 35, at 49.

5. The barracks' configuration is a training aid, and the barracks is a total training environment in which

the class system functions. Each class is assigned a floor in the barracks, which has four floors. There is a total lack of privacy. Everyone knows what everyone else is doing. The closest a cadet can come to privacy at VMI is a study table in the library because there is literally no place in the barracks that physically affords privacy. The open windows on the doors in the barracks are significant because they enable the officer in charge to walk around and check in each room at night and see every cadet without anything being hidden. This spartan living and humbleness is an aspect of the egalitarian ethic at VMI. Tr. 794-98 (Bissell).

6. The average occupancy rate of cadet rooms at VMI, according to VMI's 1985 Self-Study, was 3.7 cadets per room. It is uncommon, if not unique, for a college or university to have a dormitory occupancy rate exceeding three persons per room. Tr. 435-36 (Brewer).

7. The barracks are stark and unattractive. The windows and the doors ensure that cadets are never free from scrutiny. There is constant intermingling of cadets as a result of the close and intimate quarters and the number of cadets assigned to a room. Ventilation is poor. Furniture is unappealing. A principal object of these conditions is to induce stress. Tr. 683 (Richardson), 350 (Conrad).

8. There are no locks on the doors of cadet rooms in barracks, no windows in the barracks doors, no window shades or curtains. Barracks rooms open onto stoops. The stoops are open corridors at each level and provide access to the gang bathrooms. On the fourth floor a cadet cannot go to the bathroom or go to take a shower without being observed by everyone in that quadrangle on all levels. This places cadets under constant scrutiny and permits minute regulation of behavior, especially for the fourth classmen who reside on the top floor. VMI Ex. 58 (Richardson Report) at 3; Tr. 683-84 (Richardson).

9. The egalitarian treatment associated with barracks life is as important as the elements of stress and lack of privacy. In barracks, a cadet is totally removed from his social background. Tr. 992-93 (Bunting).

10. No other institution, including the service academies, places such emphasis on barracks or dormitory life. The lifestyle system at VMI is unique. Tr. 394 (Conrad).

G. *Military System*

1. The military regulations, etiquette, and drill, primarily furnish a rationale for the rigorous activities that are features of the other VMI systems, including the comprehensive regulation of behavior and the wearing of uniforms. The military regulations confine the choices and developmental tasks confronted by students to those considered essential to the achievement of VMI's mission. They are not directly connected to the ROTC program. VMI Ex. 58 (Richardson Report) at 6; Tr. 690 (Richardson).

2. Each cadet who matriculates at VMI must select one of the four ROTC programs during the first week of school. All cadets must be affiliated with one of the four ROTC programs, for all four years at VMI. Tr. 216-18 (Williams); Stip. 33.

3. Nothing about the Air Force ROTC program at VMI, as described in the VMI promotional booklet, is unique to VMI (other than the absence of women). Tr. 234 (Williams); U.S. Ex. 95.

4. The ROTC programs at VMI operate independently of the barracks system and its various components such as the rat line, the class system and the dyke system. Tr. 819-20 (Ripley).

H. Educational System

1. The academic program (aside from physical education) at VMI is not unique. VMI offers undergraduate courses leading to Bachelor of Arts and Bachelor of Science degrees, in liberal arts, science, and engineering disciplines. VMI Ex. 11.

2. All of the programs offered at VMI, and virtually all of the courses, are available to women at VPI. Because VMI is a much smaller school, it offers many fewer courses. VMI Ex. 8, 11.

3. The academic standards for admission to VMI are somewhat lower than those for VPI. VMI incoming students have slightly lower median SAT scores and slightly lower median class/rank. VMI Ex. 62M.

I. Evening and Summer Sessions

1. The VMI summer session is not conducted as a military college. Stip. 62. During the summer session the VMI Corps of Cadets does not exist or function as an organized body. In the VMI summer session, the class system, the rat system, and the dyke system are not in operation. Stips. 62-64.

2. During the summer session, summer students are not subject to military discipline and training, and are not required to wear uniforms or participate in military formations or drills. Stip. 65.

3. During the summer session, no enrolled student, whether or not a VMI cadet, is required to live in the barracks, but has the option to reside in the barracks or in housing in the surrounding area. During the academic year, all enrolled students are required to live in the barracks. Stip. 67.

4. During the summer session, females, both students and non-students, may not live or visit in the barracks. Stip. 68.

5. During the summer session, there is no physical training and no leadership training. Stip. 71.

6. All students enrolled in the summer session are required to abide by the honor code; however, the Student Honor Court, which adjudicates honor cases during the regular session, is not in operation. Stip. 72.

7. During summer session, outsiders (i.e., non-VMI people), live in barracks. For example, participants in sports camps and in the College Orientation Workshop program for black male high school students live in the barracks. Tr. 308 (King), 794 (Bissell), Stip. 69.

8. VMI summer session differs in many ways from the VMI regular session. It has a different purpose, offers different programs, is administered separately, has different admissions criteria and does not offer a VMI degree or military training. *Id.* No. 13, Tr. 792-94 (Bissell).

9. VMI maintains a very small evening college program. Cadets are not permitted to attend the evening school, nor do evening school students participate in any cadet activities. The evening school has no military component, and cadets and evening school students interact in no respect. No evening school students live in the barracks. Tr. 294 (King); 791-92 (Bissell).

IV. VMI's Mission

1. The mission of VMI is concisely and authoritatively captured in the final report of the Mission Study Committee of the VMI Board of Visitors (issued May 16, 1986), which states:

It is the mission of the Virginia Military Institute to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service,

advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril.

To accomplish this result, the Virginia Military Institute shall provide to qualified young men undergraduate education of highest quality—embracing engineering, science, and the arts—conducted in, and facilitated by, the unique VMI system of military discipline.

VMI Ex. 40.

2. VMI's mission is to produce educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary. Tr. 680-81 (Richardson), 41 (Knapp).

3. The concept of citizen-soldier has been associated with VMI for nearly a century and a half. VMI's mission is to train disciplined leaders for civilian and/or military life. Tr. 341 (Conrad).

4. Dr. Conrad discerned five basic goals that VMI seeks to promote in fulfilling its mission of preparing leaders: (1) education, both general and specialized; (2) military training; (3) mental and physical discipline; (4) character development; and (5) leadership training. Tr. 343-44.

5. Dr. Conrad testified:

[VMI] is an institution with a very, very powerful ethos. What is that ethos? It's a commitment to the citizen-soldier, a commitment in which the values of how one goes about preparing a citizen-soldier have taken shape, been nourished over time and I reflected it in the development of . . . eight, at once independent and at the same time, highly interdependent systems. This is an institution that has a very powerful ethos, a compelling institutional culture in which it is in essence a kind of total culture

. . . . People who know higher education know VMI, and now I certainly, in a much deeper sense understand the powerfulness of that ethos, [which] engenders such great strength and loyalty Here was a distinctive culture, with a rich ethos, and in many ways a quite extraordinary tradition of service to the state and nation.

Tr. 354-55.

6. It is important for a college to be able to articulate its mission, for more than public relations purposes. An institution must know and be able to tell others what it stands for and why it exists. Riesman Dep. 32-34; Tr. 388 (Conrad).

7. VMI has done a very good job of conveying its goals and its values, and has been successful in accomplishing those goals; specifically, instilling physical and mental discipline, character, and a kind of moral code. Tr. 389 (Conrad).

A. Character Development

1. Dr. Richard C. Richardson, Jr., an expert in higher education, single gender schools and leadership, testified that VMI is extremely unusual, even unique, in that it makes the development of character its primary purpose. VMI is primarily involved in moral development and leadership preparation. Tr. 691, 695, 765.

2. Dr. David Riesman, a leading sociologist and authority on higher education, has, in his writings, expressed dismay over the increasingly egotistical, narcissistic people coming out of our institutions of higher education. Dr. Riesman believes that the personal value of self-discipline is an important concept for colleges and universities to teach because the popular culture supports hedonism and early gratification. As a result, young people do not develop as they should. Riesman Dep. 25.

3. As a consequence of completing the rigorous tasks, succeeding, and actually graduating from VMI, VMI cadets have a sense of having overcome almost impossible physical and psychological odds. They have been put through great physical pressures and hazards, and just to have made it yields a feeling of tremendous accomplishment. Riesman Dep. 49-50.

4. VMI alumni overwhelmingly perceive that their VMI educational experience contributed to their obtaining personal goals of leadership, responsibility, self-confidence, ability to get along with others, becoming a more complete person, independence, self-reliance, adaptability, and developing a strong sense of honor and integrity. VMI Ex. 62H-62I.

5. Cadets attend VMI for these reasons: (1) because of the rigor of the experience, which represents a challenge and which he believes will test him to the ultimate; (2) because he is not satisfied with his work habits or self-discipline, and wants to become a different person; and/or (3) because he knows someone who recommends it, or because his father attended VMI. Tr. 681 (Richardson).

6. Once they arrive at VMI, cadets appreciate various attributes of the Institute: (1) the openness and the fact that they hear very directly and very candidly about their shortcomings as well as the things they do well; (2) the intensity of the experience, and the extent that it challenges them to be better; (3) the relationships they develop; and (4) the absence of distinctions between cadets, and the egalitarian environment. Tr. 681-82 (Richardson).

7. VMI's emphasis on character formation has been consistent since its founding. VMI was founded on the site of an arsenal in Lexington, Virginia, by act of the Legislature in 1839. It was patterned on the United States Military Academy at West Point and the Ecole

Polytechnique, an engineering school in Paris founded during the French Revolution. VMI Ex. 54, p. 7; 68; 61; 77A; 77M; Stips. 11-13.

8. Within a few years of the founding of VMI, most of the systems of character-building and leadership training that characterize VMI today were in place, with the exception of the dyke system, which the Corps evolved later as a corrective to a rat line that had become overly harsh. VMI Ex. 61 at 397-98; 68.

9. Throughout VMI's history, its military system—the use of military regulations, etiquette and drill—has served the function of teaching self-discipline. It is intrinsic to the VMI theory of education, but it is a means to an end, not an end in itself. The role of VMI is not primarily to develop career military men for the U.S. armed services. Stips. 26, 45, 131, 135, 138, 141; Tr. 342 (Conrad), 775 (Richardson); VMI Ex. 77A, 77D, 77F, 77N, 77O, 77S, 77T.

B. Civilian Leadership

1. VMI takes students that are average from an academic perspective, and through the character development program, graduates people who have more than average commitment and motivation as well as character. Tr. 695 (Richardson).

C. Military Leadership

1. Since 1842, at least 13,954 VMI alumni have served in the armed forces during wartime. Of these, at least 10,233 were commissioned officers and 128 were flag officers. VMI Ex. 76.

2. Military training is one of the basic goals that VMI seeks to promote in fulfilling its mission of preparing leaders. Tr. 343-44 (Conrad).

3. The VMI experience promotes the development of qualities important to effective combat leadership: Self control, self discipline, and the belief that you must subordinate your own personal desires and well-being to the good of the whole unit. The aspects of the VMI experience that are most significant in developing these qualities are: (1) the rat line; (2) the dyke system; and (3) the class system. Tr. 820-22 (Ripley).

4. The outcome of the VMI educational system is graduates who are prepared to be citizen-soldiers. Because of the VMI experience, VMI alumni are prepared to find the military benign in comparison with much of what they experienced at VMI. They are prepared for difficulty, and are prepared to help others in difficulty. Riesman Dep. 45-46.

D. VMI Mission Study

1. The General Assembly of Virginia has delegated to the VMI Board of Visitors the making of VMI's admission policy pursuant to Va. Code Annot. § 23-104, with reservation to the General Assembly pursuant to Va. Code § 23-92.

2. The VMI Board has seventeen members, including the Adjutant General of Virginia who serves *ex officio*. At least four members of the Board cannot be VMI alumni. Va. Code § 23-93. The members are persons of achievement and learning from varied backgrounds, occupations and professions. Tr. 944-47, 966-67 (Spivey).

3. The VMI Board of Visitors established the Mission Study Committee in October 1983. The Committee was established to coincide with a self-study then being conducted by the Institute. The Committee was also charged with examining the legality and wisdom of VMI's single-sex policy in light of *Mississippi University for Women v. Hogan*. It was charged with researching the effect of integration of women into the VMI Corps of Cadets. The Board of Visitors directed the Committee to exam-

ine the Institute's mission, and the relationship between its admission policy and achievement of that mission. Tr. 948-49 (Spivey).

4. The Mission Study Committee was comprised of seven persons, three of whom were VMI alumni. The Committee included a female, Dr. Virginia Lester, then President of Mary Baldwin College. Tr. 949-50 (Spivey).

5. In preparation for their deliberations, the Mission Study Committee read materials on education and on women in the military. They made site visits to single-sex and newly coeducational institutions.

6. On the visit to West Point, the Committee met with the Special Assistant to the Superintendent for Policy and Planning, the Director of Admissions, representatives of the Commandant, Director of the Center for Leadership, the Special Assistant to the Commandant for Honor, the Dean, the West Point historian and other selected officers and cadets, as well as with the Superintendent. The discussion focused on the issue of the integration of women at West Point.

7. West Point provided generally favorable information concerning coeducation: (1) male and female cadet attrition occurs for the same reasons; (2) resentment of female cadets by male cadets has faded and "[a]cceptance is gained on the basis of individual achievement"; (3) VMI graduates will "probably be considered disadvantaged in the coed Army" because they do not come from a coed environment; (4) the introduction of women did not significantly change West Point; (5) women perform and compete as well as men in cadet basic training, cadet field training, and cadet advanced training, which are summer training programs; (6) training for men and women is comparable, but not identical, taking into account gender-based differences; (7) female cadets take the same physical education courses as men,

except that they take self defense instead of boxing and wrestling; (8) the cost of educating a cadet did not rise significantly with the admission of women; (9) there had been "no changes in the curriculum, procedures, or facilities of the academic program because of the admission of women; (10) female cadets have had no trouble with the West Point honor system. "Women are underrepresented in honor offenses," and "[t]he system is applied equally to men and women"; and (11) gender integration has been successful, and "women's accomplishments have excelled all anticipated levels." U.S. Ex. 68.

8. In its visit to the Naval Academy, the Committee met with the Superintendent, the Dean of Admissions, the Academic Dean, the Acting Commandant, the Professional Development Officer and other selected officers and midshipmen of both sexes. Once again, the Committee explored a whole range of issues regarding the integration of women into the Corps—issues such as gender discrimination, discipline, academic performance, fraternization, integration into the plebe system and honor system, recruiting requirements and modifications of the physical regimen. The committee was told that: (1) "[t]here have been no changes in the Naval Academy academic program because of the introduction of women"; (2) the plebe indoctrination system of the first year "imparts stress and pressure for the entire first year," and "[w]omen are totally integrated into the entering class except for the obstacle course and some of the physical aptitude exercises"; (3) "[t]he success rate of midshipmen at the Naval Academy depends on a combination of academic rating, conduct rating, and performance rating," and "[m]ale and female midshipmen do equally well;" (4) although the Naval Academy modified its physical aptitude entrance requirements for women, male physical standards were not changed; (5) women are a minority at the Naval Academy, and some deal with this effectively and some have a hard time; and (6) "[t]he relationship be-

tween male and female midshipmen becomes more harmonious each year. Total acceptance has taken a long time; some midshipmen are more ready to accept women than others." *Id.* The Acting Commandant stated that "[n]othing has changed at the Academy except some physical training requirements and some facilities. Women have performed very well at The Naval Academy and women have met same academic standards as men." *Id.* p. 6.

9. The Committee also visited Washington & Lee University for an interview with Dr. John D. Wilson, president of that institution. There, the Committee learned that: (1) the decision to admit women to that institution was "based on the need to maintain and improve academic quality . . ."; (2) "the honor system based on a 'closed society of shared values' would not be threatened . . ."; and that (3) due to its changed admissions policy, better qualified students are expected to be attracted to the institution and that as a result the quality of life there will improve. U. S. Ex. 92C. Significantly, Dr. Wilson made the following observation:

A severe life of military discipline is at the core of the VMI experience. There is pride in mutual suffering which binds the classes together. If women were admitted, the system would have to be modified. The entire system would not be destroyed, but modifications would be inescapable.

Id.

10. Mr. Casteen participated in the introduction of co-education at the University of Virginia, and visited the federal service academies to obtain information on how those institutions were preparing to integrate women. He characterized the introduction of coeducation at the University of Virginia as a "very positive experience." U.S. Ex. 69. He stated that, contrary to expectations, female students at the University of Virginia tend to enroll in

the strongest departments and superior programs including engineering and architecture. *Id.* He pointed out that "all male colleges which have admitted women have been strengthen[ed] by women" *Id.* at 2. He emphasized the role of an institution's leadership in the admission of women: "[I]t happened [at the University of Virginia] because top leadership made it happen." *Id.* at 3. Most tellingly, he stated:

[T]he success rates of women at the USMA have been extraordinary. He stated that it was his observation that women will conform and excell in any environment. He added that their success will depend on the application of the internal discipline system and whether or not it is applied equally to all cadets. He pointed out that at UVA, women were not assigned to separate dormitories but housed in coed dorms.

* * *

VMI represents the idea that every citizen is a soldier on demand, and this should include women Thus, he stated, the Institute has a chance to provide leadership in this regard by training women for military service.

Id. at 2, 3.

11. The Mission Study Committee issued its final report in May 1986. It "found no information that would warrant the change of VMI status as a single-sex college." The Report provided very little indication of how this conclusion was reached. VMI Ex. 40. The one and one-half pages in the committee's final report devoted to analyzing the information it obtained primarily focuses on anticipated difficulties in attracting females to VMI. *Id.* p. 2-3. One paragraph of this analysis epitomizes the current position of the VMI defendants in this litigation:

The presence of women at the Institute would not alter the program academically; however, there would

have to be some adjustments made in the military and physical demands made upon male cadets. Because many of these demands contribute to the ethos of which the Virginia Military Institute is proud and which, it is firmly believed, contributes to the unity of the Corps, there is doubt that the same spirit could be maintained at the same level in the same way if women were introduced into the Corps.

Id. p. 2.

12. The Report of the Reaffirmation Committee of the Commission on Colleges for the Southern Association of Colleges and Schools on Virginia Military Institute (March 16-19, 1986) provides:

The visiting committee found that although the statement of purpose had not been changed since the last self-study, the Board of Visitors assisted by staff of the Institute is reviewing VMI's mission. This review has been thorough and has included visits to other institutions with review of their mission and purpose statements. The Committee commends the Board and VMI administration for recognizing the need for periodic review of the Institute's purpose and for engaging in activities necessary to modify that statement of that purpose as may be indicated.

As the self-study states, the Institute's Mission Statement has served it well over the years. As an institution approaching its 150th birthday, the Mission Statement reflects the constant purpose of VMI to provide a distinctive and superior academic program conducted in and facilitated by a rigorous system of military discipline. Graduates of the Institute come to know this mission in a very personal way by their participation in VMI's unique system. The graduates as products of their system have by their achievements brought distinction to the Institute

VMI Ex. 35 at 5, 12.

13. The Mission Study Committee of the Board of Visitors of the Virginia Military Institute found that the admission of women into the VMI Corps of Cadets would alter the mission of VMI. It considered the reasons that other institutions had changed from single-sex to co-educational status. It found the motivation factors to be mixed and further found that none of the motivating factors of the other institutions applied to the VMI mission. VMI Ex. 40 at 2.

14. This evidence amply supports a finding that VMI's mission was established early in the life of the institution, and has been continued only after reasoned and careful analysis by the Board of Visitors.

V. MISSION OF MILITARY UNIT AT VPI

1. The purpose of the VPI Corps of Cadets "is to produce men and women of the Virginia Polytechnic Institute and State University who are honorable, educated and trained for military service to their country and prepared to be effective leaders in the varied work of military and civil life." Stip. 152; Tr. 460 (Musser); U.S. Ex. 57.

2. VPI has approximately 18,000 students, roughly 40% of whom are women. Its Corps of Cadets, a residential ROTC unit, now contains 394 cadets, including 67 women. Tr. 443 (Musser).

3. All unmarried VPI students enrolled in the ROTC program must live in the residential hall. Married cadets are not required to live in the hall. Tr. 472 (Musser).

4. Females first entered the VPI Corps of Cadets in the fall of 1973 and were assigned to a separate unit within the Corps. In February 1979, "the female cadets were integrated into the eight regular line units Concurrent with the integration of the female cadets, a female version of the male uniform was authorized, thereby bringing about a greater uniformity in the attire of Corps members." U.S. Ex. 60.

5. There are no differences on the basis of gender in admission requirements to the Corps, in participation in the Corps, or in physical accommodations for cadets. Tr. 469-70 (Musser). Female cadets at VPI have, at one time or another, held every leadership position in the Corps, including regimental commander, which is the most senior position. Stip. 156; Tr. 447-48.

6. The typical weekly schedule for members of the Corps is the same for men and for women. Tr. 450; U.S. Ex. 51, Reg. 3.1. Each morning one battalion, consisting of 250 cadets, forms up and marches to breakfast. After breakfast, cadets start their academic day which normally runs until 4:00 or 5:00 p.m. At 5:00 p.m., there is a retreat ceremony, and cadets are required to be in their rooms at 7:00 p.m., with lights out at 11:00 p.m. Tr. 448-49. Cadets must be in uniform all day. Tr. 450 (Musser).

7. Each new cadet goes through new cadet training, also called "cadre week," which takes place about eight days prior to the entry of all other freshman into Virginia Tech. Tr. 450-51; U.S. Ex. 77. Cadre week is a "tough week of learning," which involves classes, marching and drill lessons, lectures on the honor code, and athletics. It starts early each morning and ends about 11:00 p.m. Tr. 451. Without any distinctions, men and women participate in the same activities during cadre week. Tr. 452 (Musser).

8. The new cadet system, which is mandatory for all entering cadets, runs until sometime between Thanksgiving and Christmas, when the new cadets are recognized as a class by the upperclassmen. The new cadet system includes daily calisthenics, exercises, runs, and other athletics. Women are required to participate in the same calisthenics, exercises, and runs as the men, although some allowances are made for gender differences, particularly with regard to upper body strength. Both men

and women participate in all parades and drills. Tr. 454-56 (Musser). In sum:

All VPI Cadets must successfully master in their first year a basic training program. The basic training program is a rigorous challenge, physically and mentally. It is intended to place all cadets on equal footing; teach fundamentals of military courtesy and discipline; impress upon cadets military customs, ideals, and esprit of the Corps and instill respect for authority, self-reliance, and develop leadership potential. VPI believes that completion of the training program also serves as a binding element between and among cadets.

Stip. 155.

9. The new cadet system requires memorizing "new cadet knowledge," which is information about the Corps that cadets must be able to recite to upperclassmen on demand. If a cadet does not know certain information when he or she is asked, that cadet can be required to do push-ups or, in some cases, marching tours. A tour is a one-hour march around the barracks with five-minute breaks every twenty minutes. Both men and women can be subjected to push-ups or tours. Tr. 457-59 (Musser); U.S. Ex. 16.

10. The Corps' honor code states: "I will not lie, cheat or steal nor tolerate those who do." Tr. 461-62; U.S. Ex. 57. The Corps' disciplinary system is modeled after the Uniform Code of Military Justice, and it applies equally to men and women. Tr. 462.

11. The VPI Corps is organized along Army lines, but a system of class privileges also exists. These entitle upperclassmen to greater freedoms as they progress. Tr. 463-64 (Musser); U.S. Ex. 57.

12. Both male and female cadets are subject to scheduled and unscheduled room inspections. Failure to pass

inspection results in demerits. No distinctions are made on the basis of gender. There are no restrictions regarding who can visit the cadet dormitories, but visitors must be escorted. Tr. 466-68 (Musser); U.S. Ex. 57.

13. The Corps has a dyke system similar to VMI's, the primary difference being that VPI uses juniors and VMI uses seniors. Both males and females participate in this mentor system. Tr. 468-69 (Musser).

14. Two floors in each building house other students who are not cadets. These students share the same facilities throughout the buildings with the cadets. Tr. 465-66 (Musser).

15. In a section of one of the residence halls, where the regimental cadet staff is housed, the men and women share the same bathroom, although not at the same time. There currently are four men and two women on the regimental staff. Tr. 427, 473 (Musser).

16. VPI cadets eat in the same mess hall as other students, although there is no section set aside for the Corps. Other students can also eat in that section. By contrast, cadets at VMI eat together in one large facility that accommodates all of them. VPI cadets normally eat both breakfast and dinner together. Tr. 428, 457 (Musser).

17. The institutional environment of the VPI Cadet Corps differs greatly from that of VMI. Because only 2-3% of VPI students live in the Cadet Corps barracks, the military experience is more diffuse. Tr. 336 (Conrad).

18. Because VMI is a small place with 1,300 students, and VPI is a "multiversity" with 18,000 students in graduate as well as undergraduate courses, it offers its students a different educational experience. Tr. 509 (Conrad).

19. The most dramatic differences between VMI and VPI concern the operation of the respective Corps. VMI emphasizes uniformity, hierarchy, and the adversative method. VPI recognizes individual difference and is more informal. Tr. 361 (Conrad). VPI uses "positive motivation" rather than the "negative motivation" used at VPI. Tr. 474 (Musser).

20. The differences between VPI and VMI's educational experiences outweigh the similarities, independent of gender. Tr. 363-64 (Conrad). Thus, the programs have similar goals but very different methods. This leads to two conclusions: (1) Women are denied a unique educational opportunity that is available only at VMI; and (2) The success of women at VPI sheds little light on whether women would be successful at VMI.

VI. CONTRASTING MISSION OF FEDERAL SERVICE ACADEMIES

1. The mission of the federal service academies is to prepare cadets for career service in the armed forces. This is very different from the mission of VMI, which is directed at preparation for both military and civilian life. Only about 15% of VMI cadets enter career military service. Tr. 410-11 (Conrad); Riesman Dep. 98-99.

2. VMI has gone to considerable lengths to assure the public that it is not simply a military college. Tr. 342-43 (Conrad).

VII. DIFFERENCES BETWEEN MEN AND WOMEN

A. Gender-Based Physiological Differences

1. When Congress made the decision to admit women at West Point, they instructed the Military Academy, in effect, to change whatever standards needed to be changed in order to accommodate physiological differences between men and women. West Point has identified more than 120 physiological differences that exist between men

and women, and tries to accommodate those differences to the minimal extent necessary. Tr. 510-11, 513 (Toffler).

2. The physiological differences between males and females identified by West Point's Office of Institutional Research are very real differences, *not stereotypes*. Tr. 519 (Toffler).

3. Most men perform far better than most women in activities which require explosive power, e.g., sprinting, basketball throw, medicine ball put, and jumping events. Even when size is held constant, females are, on the average, only 80% as strong as males. VMI Ex. 119 at 26.

4. The speed of movement in women is, on the average, slower than in men. VMI Ex. 119 at 27.

5. Aerobic capacity relates to the ability to consume and utilize oxygen. The number of liters of oxygen one can effectively metabolize on a minute-by-minute basis indicates the fitness level of a person. Using the applicant pool of individuals for induction into the U.S. Army, Dr. Paul Davis, VMI's expert in human physiology, determined that for high fitness level requirements, such as those for military firefighters, infantrymen, and most of the combat arms, 5% or fewer median college-age females would possess the requisite fitness level to perform these jobs, as compared to 85% of median college-age males. Approximately 15% of median college-age females can perform activities requiring medium aerobic capacities. Approximately 95% of median college-age males can perform activities requiring medium aerobic capacity. VMI Ex. 59A; Tr. 886-88.

6. High maximal lifting capacity refers to the ability to lift 50 kilograms to a height of 132 centimeters of distance, which corresponds to the tail board of a military truck. Approximately 7% of median college-age females possess high maximal lifting capacity, as compared with

approximately 80% of males. Approximately 50% of median college-age females can engage in activities requiring a medium maximal lifting capacity, while 100% of median college-age males can engage in such activities. VMI Ex. 59B; Tr. 888-90 (Davis).

7. On the average, college-age females possess approximately 10% more body fat than college-age males. Body fat imposes a burden on some kinds of physical performance. VMI Ex. 59C; Tr. 89-92 (Davis).

8. On the average, college-age females perform a two-mile run approximately three minutes slower than the median for college-age males. VMI Ex. 59D; Tr. 893-95 (Davis).

9. The median college-age female is not capable of performing push-ups equivalent to that of the median college-age male. Of the females tested, none was able to come close to meeting the push-up requirement of the VMI physical fitness test. The maximum number of push-ups by a female was 18, compared with a minimum requirement of 45 push-ups on the VMI fitness test. VMI Ex. 59E; Tr. 894-95 (Davis).

10. There is no data available to compare the performance of males and females with respect to pull-ups because only the Marine Corps has a requirement for pull-ups. Dr. Davis testified that the female is at a distinct disadvantage as far as the performance of that activity, and the difference between performance of the genders in this activity is 500-1000 percent. The minimum requirement for pull-ups for the VMI physical test is five. Tr. 896.

11. Dr. Davis examined aggregate data related to injuries incurred among a group of 2,400 persons participating in Army basic training. Army basic training has a duration of eight weeks, while the VMI rat line has a duration of about seven months. The data show that physical fitness and avoidance of injury are correlated;

as one's fitness level improves, the incidence of injury goes down. However, regardless of fitness level, differences exist between males and females across the board in that females suffer injuries more frequently than males. Tr. 907-13.

12. Median college-age females tend to sustain injury up to eight times the rate of median college-age males when engaged in the same or similar physical activities. VMI Ex. 59G to 59O; Tr. 909-13 (Davis).

13. By the most conservative estimate, the lost time that females would suffer due to injuries—based on the Army model—is 480% greater than the lost time experienced by males in Army basic training. Tr. 913 (Davis). Despite the higher injury rate for women (and despite the additional disability leaves associated with pregnancy), a 1978 Navy study found that male soldiers are, on the average, more likely to be absent from duty a particular time, principally because men are much more likely to be suspended for disciplinary related reasons. U.S. Ex. 18.

14. Comparison of the United States Military Academy classes of 1989 and 1981 male and female cadets on the Army physical fitness tests, USMA indoor obstacle course test, and the USMA physical ability test, shows the following:

- (a) Seven of eight physical tests show half (50th percentile) of the women performed below the bottom five percent of the men. The single exception is the Army physical fitness sit-up test, which was almost identical for the two groups.
- (b) Three-quarters (75th percentile) of the women performed below the bottom five percent of the men in the indoor obstacle course and physical ability test push-up, standing long jump, modified basketball throw, and 300-yard shuttle run test.

- (c) The 75th percentile of women for the class of 1989 Army physical fitness test push-up performance was equal to the 8th percentile performance for the men; and the 75th percentile women for the class of 1981 performance was equal to the 13th percentile performance for the men.
- (d) For the Army physical fitness test the two-mile run, the 75th percentile women for the classes of 1989 and 1981 performance was equal to the 22nd and 13th percentile men, respectively.

VMI Ex. 157.

15. West Point has concluded that males outperformed the females on all of the common physical aptitude tests, and that competition between the two groups on the basis of raw scores would severely limit the admission opportunities for women. VMI Ex. 166, at 3.

B. *Gender-Based Developmental Differences*

1. According to Dr. Richardson, the "nature of an experience that is growth-producing for a majority of women, according to the literature, is one that is supportive, is one that emphasizes positive motivation. I'm not saying that some women don't do well under adversative model, undoubtedly there are some who do, but you [do not] design educational experiences around the exception. You have to design them around the rule, and I think you would find that the doubting model . . . the adversative model . . . would have to be gradually adapt[ed] so that it incorporated more of the positive motivation, positive reinforcement." Tr. 702.

2. A substantial body of contemporary scholarship and research supports the proposition that, although males and females have significant areas of development overlap, they also have differing developmental needs that are deep-seated. VMI Ex. 73; Tr. 376-77 (Conrad), 686-87, 692-93 (Richardson); Riesman Dep. 13, 57-67.

3. The literature regarding developmental differences between males and females and the advantages of single-sex education contained in VMI Ex. 73 reflects the work of only a small portion of the academics who, in recent years, have suggested that there are important differences between men and women in learning and developmental needs. Tr. 376-77 (Conrad).

4. Given these developmental differences females and males characteristically learn differently. Males tend to need an atmosphere of adversativeness or ritual combat in which the teacher is a disciplinarian and a worthy competitor. Females tend to thrive in a cooperative atmosphere in which the teacher is emotionally connected with the students. Reisman Dep. 63-65, 95, 106-07; Tr. 684-87, 692-93 (Richardson); VMI Ex. 73B, D, E, and G.

5. Commenting on the scholarly literature and empirical evidence that single-sex education is desirable in light of gender-based development differences the government's expert, Dr. Conrad, described the gender differences identified by researches as "tendencies." He emphasized that the attributes of males and females *in individual cases* may diverge from these average tendencies. In other words, there are exceptions to the general rule. Tr. 377, 380 (Conrad).

6. Colonel Toffler of West Point has observed the psychological and sociological differences between males and females during his study of the integration process at West Point. He attributes the slightly higher attrition rates for females at West Point, in part, to gender-based sociological differences. West Point attempts to accommodate the distinctive psychological and sociological needs of women. The psychological and sociological differences between men and women are real differences, not stereotypes. Tr. 513-16, 519, 545-50 (Toffler).

7. During his trial testimony, Dr. Conrad not only acknowledged the broad empirical support for the value of single-sex education, and also described himself as a

"believer in single-sex education." Dr. Conrad commented that single-sex education has great virtues for many people under many conditions. Tr. 373. In response to a question from the Court, Dr. Conrad stated that his advocacy of coeducation at VMI was based on a philosophical preference for openness in public institutions, and not on considerations of educational quality. Tr. 382.

8. Single-sex educational opportunities are valuable for both males and females. For many men, a single-sex college is optimal. At an all-male college, adolescent males benefit from being able to focus exclusively on the work at hand, without the intrusion of any sexual tension. Reisman Dep. 38-39; Tr. 986-87 (Bunting).

9. Single-sex schools for adolescent men are effective where discipline is maintained and sound role models are present. Reisman Dep. 95, 107; Tr. 693 (Richardson).

10. According to the research of Alexander Astin, based on data from the early 1970's, single-sex colleges show a pattern of effects on both sexes that is almost uniformly positive. Students of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience (the sole exception is social life compared with their counterparts in coeducational institutions). Men's colleges substantially increase the likelihood that men will carry out career plans in law, business and college teaching; they also have a substantial positive effect on starting salaries in business. Women's colleges increase the chances that women will obtain positions of leadership, complete the baccalaureate degree, and aspire to higher degrees. Alexander Astin, *Four Critical Years*, (1977); admitted as VMI Ex. 73I.³

³ Astin's research was cited favorably by Justice Powell in his dissenting opinion in *Hogan v. Mississippi University for Women*, 458 U.S. 718, 738-39 (1982). The volume was properly admitted as a trial exhibit in this case.

11. Astin's research indicates that students are able to invest more energy in academic pursuits and in interaction with faculty in single-sex colleges because they have few opportunities to dissipate energy in courtship activities. In all likelihood, heterosexual activity is more circumscribed—confined to weekends, for example—in single-sex colleges. VMI Ex. 73I, K, L, M, P, Q, and R; Reisman Dep. 54, 109; Tr. 986 (Bunting).

12. Research also shows that students attending single-sex colleges are more likely to take the risk of choosing a career normally associated with the other sex than are students in coeducational colleges. Marvin Bressler and Peter Wendell, "The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations," 51 *Journal of Higher Education* 650 (1980); admitted as VMI Ex. 73J.

13. Astin has written that, with respect to single-sex colleges as compared to coeducational colleges, the greater interaction with faculty and greater satisfaction with the collegiate experience, despite the constraints on social life, may result from the greater sense of identification and communal feeling when both students and faculty are predominantly of the same sex. VMI Ex. 73I; see also VMI Ex. 73K, L, M, and Q.

14. Single-gender schools facilitate their students' focusing on education by screening out distractions. Thus, the single-gender nature of VMI is directly related to its goal of focusing cadets' energies on development of leadership values. Tr. 694, 729-31 (Richardson); Reisman Dep. 54, 62-63, 94.

VIII. ANTICIPATED EFFECTS OF COEDUCATION ON VMI

1. A coeducational VMI would offer neither males nor females the VMI education that now exists. The changes would substantially affect the method now used to educate citizen-soldiers. Tr. 804 (Bissell), Dep. 101 (Reisman), 676-77 (Richardson).

2. Colleges that face a major change in clientele typically change their methods in three stages:

The first stage involves removal of the barriers that barred a particular group or class of students from admission.

The second stage involves efforts to help the new class of students succeed, through such measures as recruitment efforts and support services.

The third and final stage involves recognition that the institution cannot attract sufficient numbers of the new class of students to make their experience beneficial without modifying the institutional experience. As a result, at this third stage, the institutional experience, even its mission, is altered in order to conform to the developmental needs of the changed clientele.

Tr. 696-98 (Richardson).

3. The admission of women at VMI would represent a "dramatic clientele change." Tr. 368 (Conrad).

A. *Demand for VMI Education among Women*

1. Trial testimony included a great deal of speculation, but very little evidence, on demand for a VMI education among women. This uncertainty is due to a lack of recruitment among women.

2. VMI engages in extensive recruiting activities, including visiting high schools to "spread the word about the valuable education" it offers. Tr. 42 (Knapp).

3. Alumni also perform substantial recruitment activities. Their efforts to date have been aimed exclusively at male applicants. Tr. 172 (Sandy).

4. Typically, VMI representatives set up tables at high schools and offer materials regarding VMI. Women who stop by are told that VMI accepts only male applicants.

VMI does not keep any records of either the names or the number of women who stop by. Tr. 44 (Knapp).

5. In the past, VMI responded to inquiries from females by sending letters explaining VMI's male-only admissions policy. In the last two years, Lt. Col. Sandy has been instructed not to respond in any fashion to inquiries from females. Women who send written inquiries to VMI now receive no response at all. Tr. 193-94.

6. Between 1988 and 1990, VMI received inquiries, test scores, or other requests for information from 347 women. Because VMI did not respond to them, the seriousness of these inquiries cannot be determined. U.S. Ex. 104, 105.

B. *VMI's Special Recruitment of Blacks*

1. VMI has distributed a recruitment booklet aimed specifically at black students. U.S. Ex. 79. VMI also attends specific programs for minority students, purchases names from the college board of black students with SAT scores sufficient for admission to VMI, and targets specific high schools to recruit black students. VMI targets black students because it likes "to have students of different backgrounds, racial backgrounds, ethnic backgrounds in the school," and because recruiting black students is one of the objectives set forth by the State Council on Higher Education. Tr. 173-74 (Sandy).

2. Some special steps are taken to address the needs of black students. VMI's 1990-91 budget includes \$22,000 for expenditures on "Retention of Black Cadets." U.S. Ex. 3 at 28.

VMI's self-study reported:

A program for the retention and effective performance of black freshmen was initiated in the fall of 1983. The primary objective was to insure the students' success in the basic disciplines of mathematics and English. The program is thus designed primarily

to offer the student crucial academic support. Experience gained during the first year of the Cadet Retention Program indicates that black freshmen also need and certainly will appreciate, outside a formal academic context, opportunities to discuss their shared experiences as new, minority members of a dominantly white and tradition-oriented student body. This apparent need and the similar one of other black cadets is also addressed. . . . Social-cultural support and black student morale within a dominantly white institution are important secondary concerns of the program.

U.S. Ex. 24, at 57-61.

3. VMI offers a three-week college orientation workshop to black (male) high school students. The program is intended to get students interested in going to college in general, and in attending VMI in particular. The students live in the barracks, attend classes, and go through demanding physical training "to show them what it might be like at VMI." Tr. 308, 312-13 (King).

4. The Promaji Club, one of about 70 extracurricular clubs at VMI, is organized as a club following the interests of black cadets. Like all clubs at VMI, it is open to all students. U.S. Ex. 79 at 8; Tr. 49 (Knapp).

5. VMI is currently about 7% black. The special recruitment program for blacks has had little, if any, effect on VMI's method of accomplishing its mission. Black cadets particularly appreciate the egalitarianism of VMI. Tr. 46-48 (Knapp); Reisman Dep. 79, 81-83.

C. *Recruitment of Women at Other Military Institutions*

1. Currently, approximately 250 women attend residential ROTC military programs, which are based at Texas A&M University, Norwich University, North Georgia College and VPI. VMI Ex. 62L.

2. Four hundred and sixty-one women are enrolled at West Point, 423 at the Naval Academy, 532 at the Air Force Academy, and 131 at the Coast Guard Academy. These institutions feature a military curriculum. However, they differ from VMI both in their mission and in that they do not have admission fees and, in fact, pay student salaries while they are enrolled.

3. Dr. Richardson testified that he believed that successful recruitment of women would likely yield VMI a cadet corps of approximately 10% women, or 130 women. This number is apparently based on the experience at West Point, which offers a very different kind of program and has much higher academic standards. Dr. Richardson conceded that the number is highly speculative. Tr. 720-21.

4. Expert estimates of the number of women necessary to provide a good educational environment for women at a formerly all-male school range from 10% to 40%. The 40% figure appears in an October 1990 Report of the Committee on Women's Issues of the United States Naval Academy Board of Visitors, which has a significantly lower number of women at this time. VMI Ex. 67 at 11. The 10% figure is based on the positive West Point experience, and was accepted by VMI's Mission Study Committee. Tr. 486-87 (Toffler); Stip. 7; VMI Ex. 40 at 2.

5. Of the 1,946 women who applied for admission to West Point in the class of 1992, only 155 were admitted. The female applicants not admitted did not meet the qualifications for admission. The capacity for the class was filled, and in the opinion of the Admissions Committee, filled with the best-qualified applicants, and the high-competition objectives and class objectives had been satisfied. Tr. 484-85 (Toffler).

6. Currently, many men who are denied admission to the federal service academies meet the admission stand-

ards of VMI. However, VMI has found that very few rejected applicants from West Point choose to attend VMI. Tr. 204-05 (Sandy).

7. The federal military academies limit the admission of female students by placing a cap on the number of such students who can be admitted in any one year. The cap is equivalent to the percentage of women presently on active duty in the branch of the armed forces represented by the particular academy. Approximately 10% of the cadets at West Point are women. Stip. 196; Tr. 482 (Toffler).

8. Based on the fragmentary evidence, including VMI's experience with recruitment of blacks, it appears that VMI would be able to achieve at least 10% female enrollment while maintaining its ROTC requirements. This would be a sufficient "critical mass" to provide the female cadets with a positive educational experience.

D. Need for Privacy

1. If VMI were to admit women, there would be changes in the barracks culture. Adaptations would have to be made in order to provide for individual privacy, for the sake of the men as well as for the sake of the women. Tr. 367 (Conrad); Reisman Dep. 61-62.

2. The introduction of privacy required by admission of women at VMI would contradict the principle that everyone is constantly subject to scrutiny by everyone else. The honor code would cease to be the absolute boundary between VMI and the outside world because it would become possible for cadets to take action at VMI without being observed. Tr. 701.

E. Physical Education

1. If women were admitted to VMI, it would be necessary to change certain physical training program courses and to set different standards. Unlike the federal service

academies, VMI currently does not use "ability groups" in its physical programs or activities. VMI imposes the same physical requirements on a 150-pound cadet as on a 190-pound cadet. Tr. 788-89 (Bissell).

2. Changes in the physical education program would be necessary if women were admitted to VMI. For example, boxing and wrestling requirements would have to be changed, as would certain aspects of the rat training programs. Either these would have to be abandoned, or there would have to be accommodations that would result in a dual track for women. Tr. 35, 66-67 (Knapp), 896-98 (Davis), 788-89 (Bissell).

3. Currently, 98% of VMI cadets pass the physical fitness test before graduation. Assuming an applicant pool similar to that at the military academies, approximately 15% of females in the applicant pool could successfully meet the requirements of the current VMI physical fitness test.

4. The goal of physical testing is to design a single program or criteria in such a way as to insure that it represents a reasonable challenge to the greatest number of individuals. Because of the physiological differences between male and female cadets, it would not be possible to design a program that would be challenging to both sexes if it were a coeducational program. A program that would challenge but not discourage female cadets would pose an insufficient challenge for the vast majority of males. Tr. 898-900 (Davis).

5. Female cadets would not be able to perform the tasks in the VMI rat training program at a level comparable to that of male cadets. Because of physiological differences, the majority of females would not be able to complete the tasks associated with the rat line as currently constructed, at the same levels as males. Tr. 906 (Davis).

6. If VMI were coeducational and females were subjected to the same physical demands as male cadets,

females would suffer on the order of 300% more injuries than males. Tr. 902-07 (Davis).

7. The intensity and aggressiveness of the current program would be reduced if women were admitted and requirements for all cadets were adjusted, and rat training would have to undergo extensive changes. The program's benefit to the morale of male participants would be adversely affected. Tr. 918-22, 930-32 (Davis).

F. *Armed Forces Experience*

1. The Marine Corps trains males and females in separate units at boot camp. The Marine Corps tried using a gender-integrated platoon in officer basic training, but found the experience inferior. One concern was that the program became insufficiently rigorous for males. Tr. 818-19 (Ripley).

2. The Marine Corps also trains men and women in separate summer camps as part of the Marine Corps ROTC program. Tr. 819 (Ripley).

3. The U. S. Army segregates men and women in basic training at the platoon level. They are integrated at the company level. The Army looked at a variety of combinations and determined that segregation was appropriate for basic soldier training. Tr. 616 (Toffler), 786-88 (Bissell).

G. *West Point Experience*

1. When Congress passed a statute requiring the federal service academies to admit females, it directed the academies to make the adjustments necessary to accommodate the physiological differences between men and women. Tr. 510-11 (Toffler).

2. Since admitting women, West Point has modified basic training to break it into groups according to ability. Tr. 601-03 (Toffler).

3. Since the admission of women, West Point has adopted the concept of comparable or equivalent training. The physical activities assigned to women and to men differ, but have comparable training benefit for the people who go through them. An example would be boxing for males versus self-defense or judo for females. Another example is pull-ups for males versus the flexed arm hang for females. Tr. 609-10 (Toffler).

4. Prior to the admission of women, recondo training (i.e., various strenuous activities, including a forced march with a pack) was part of cadet field training. Recondo training is no longer conducted during field training. Tr. 606-07 (Toffler).

5. Prior to the admission of women, running exercises were conducted wearing combat boots. Subsequently, a change was made so that running exercises were conducted in running shoes. Prior to the change, women were suffering a significantly higher injury rate in cadet basic training. Tr. 608-09 (Toffler).

6. Since women have been admitted at West Point, physical training no longer includes running events in which cadets carry weapons. Tr. 604-06 (Toffler).

7. Since the admission of women, the indoor obstacle course that cadets run as part of their training has been modified to remove certain events and replace them with others. The events that were removed were events that required upper body strength. One of the reasons these events were eliminated was concern that women would be psychologically discouraged by them. Tr. 607-08 (Toffler).

8. If women were admitted to VMI, there would be changes in physical education requirements to reflect physiological differences. Coeducation would also affect physical training, which is incorporated into the rat system. Tr. 366 (Conrad).

9. At VMI, there are intense physical demands placed on cadets. Given the biological differences between men and women, changes would have to be made to adapt the physical demands to the capabilities of women. VMI would have to make the changes analogous to those that have been made at the service academies, and might find it necessary to introduce the concept of comparable training used at West Point. Tr. 366-67 (Conrad).

H. *Impact of Gender Classes*

1. The VMI experience is based on absolute equality, which is achieved through treating everyone in exactly the same way. VMI Ex. 58 (Richardson Report) at 22.

2. There are approximately 66 approved clubs at VMI. Consistent with the egalitarian ethic, VMI prohibits the exclusion of any cadet from membership in any club. VMI also has a policy that prohibits fraternities and secret societies. The significance of those policies lies in "the egalitarian aspect that every cadet must be exactly the same, treated alike and attend or go to any club or facilities that may be available to them, but a total egalitarian approach." Tr. 790-91 (Bissell).

3. Given the actual physiological, psychological, and sociological differences between males and females, it would be impossible to treat everyone fairly by continuing to treat them the same if women were admitted to VMI. Equal treatment would necessarily give way to fair treatment, thus undermining egalitarianism. Tr. 698, 701-02 (Richardson).

4. If women were admitted to VMI, class differences between males and females would be introduced. These differences would appear in physical training. Tr. 367-68 (Conrad).

5. If women were admitted to VMI and housed in a separate barracks, they would miss the VMI experience.

It would provide women with an undesirable experience in which their second-class citizenship would be emphasized. Some military institutions that have tried housing women in separate quarters, and found that it simply does not work. In order to achieve results satisfactory to them, they must be integrated rather than isolated from the experience. Tr. 706 (Richardson).

6. The admission of women at VMI would undermine the ethic of egalitarianism by creating jealousies and concerns about whether people were being treated equitably. Cross-sex relationships, dating, and aspirations are attributes of a coeducational system, and are inconsistent with the complete equality that is a central attribute of the VMI system. Tr. 731 (Richardson); Reisman Dep. 60-61.

7. Since the admission of female cadets at West Point, studies have consistently shown that cadets of both sexes perceive treatment as unequal. This perception gives rise to jealousy and resentment among cadets. Tr. 518-19 (Toffler); VMI Ex. 91, 92, 103.

8. Survey data compiled by West Point indicates that some cadets do not accept the concept of comparable or equivalent training because they resent the fact that they have to do something at one level while another person does not have to meet the same standard. Tr. 610-11 (Toffler).

I. *Impact of Cross-Sex Relationships*

1. Dr. Richardson testified: "[VMI] does what it does because it has an isolated cloistered environment that focuses on a very narrow range of purposes [It] uses a developmental process that is attuned to male developmental needs during the period of adolescence. [The admission of women would] inject . . . into that environment the necessity of coping with cross-sex relationships, . . . especially at a very vulnerable period of

development [when] people are in fact trying out the relationships that will characterize their future life in society [The VMI system] considers only how you develop a particular gender and it is focused in every part on . . . optimizing that development." Tr. 729-30.

2. Admission of women at VMI would produce cross-sex relationships among cadets that would significantly alter the character-building and leadership-development aspects of the VMI experience. Tr. 700-01 (Richardson).

3. Cross-sex interaction and relationships would inject a new and distracting developmental aspect into an environment at VMI that currently excludes that aspect and focuses narrowly upon other aspects of development. Tr. 700-01, 729-31 (Richardson).

4. Equal treatment is much more likely to be obtained in a single-sex setting. Cross-sex relationships, dating, and aspirations are attributes of a coeducational system, and are inconsistent with the complete equality that is a central attribute of the VMI system. Reisman Dep. 60-61.

J. West Point Experience

1. The VMI Mission Study Committee determined that integration of women at West Point was made possible by the Academy's move away from its adversative new cadet system to a much more developmental style of training and emphasis on positive leadership. The change coincided with Army-wide changes in leadership style. U.S. Ex. 68.

2. The first women were admitted to West Point in the summer of 1976 and graduated with the class of 1980. The admission of women, at that point, resulted from legislation signed by the President in 1975. Prior to that time, West Point's position on the admission of women was one of opposition. Tr. 482-83 (Toffler).

3. At West Point, dating between cadets is generally permitted except that fourth class cadets must date within

their class and all cadets are precluded from dating within the chain of command. West Point has conducted no study to determine the impact of dating on the discipline of the Corps of Cadets. Tr. 623-25 (Toffler); VMI Ex. 146 at 2-3.

4. The doors at West Point on cadet rooms are solid and equipped with locks. Cadets are permitted to close their doors unless there are only two cadets in the room at a particular time and the cadets are of the opposite sex. Tr. 627-38 (Toffler).

5. West Point regulations require that a person desiring entry to a cadet's room must knock and await acknowledgement before entering. VMI Ex. 146 at 2-4.

6. At West Point and Virginia Tech, unlike VMI, there are doors on the toilet partitions separating the toilets. Tr. 432-33 (Brewer).

7. West Point is not concerned with eliminating all visible financial distinctions among cadets. Tr. 626-27 (Toffler).

8. West Point abolished the new cadet system, or fourth class system, in 1990. Under the current program, fourth class cadets are assigned a faculty member as mentor. After cadet basic training, which is the 6-8 weeks before the start of the academic year for new cadets, West Point has reduced the amount of memorizing and reciting information about West Point's history and traditions by new cadets. West Point has also acted to eliminate practices such as upperclassmen yelling at and disciplining new cadets, requiring them to run personal errands, bracing (sitting with chin tucked in the cavity of one's neck) during meals, and requiring physical activities such as push-ups. Tr. 616-20 (Toffler).

9. With the admission of women, West Point modified regulations relating to uniforms, hair length and jewelry. Tr. 625-26 (Toffler).

10. Under West Point's regulations, if a subordinate believes that a senior is operating improperly, it is within their place to discuss that with the senior. Tr. 595-96 (Toffler).

11. Hazing of new cadets, including demeaning or insulting activity, and requiring excessive physical performance, are examples of improper senior-subordinate interaction, which are not permitted at West Point. Though such interactions were technically improper prior to 1990, they were common practices and were part of the new cadet system. Since 1990, the prohibition on these activities has been enforced. Tr. 619-23 (Toffler).

12. The abolition in 1990 of new cadet, or fourth class, system at West Point, and the substitution of a new system, were designed to eliminate the application of stress upon fourth class cadets by more senior cadets. The new system uses positive motivation, instead of stress, as a means of leadership development. The new leadership development is designed to function for all four years of the educational experience, rather than being focused upon the first year.

K. *Educational and Military Systems*

1. Experts are in general agreement that coeducation would have little or no effect on ROTC program at VMI. If anything, the VMI ROTC experience would become a better training program from the perspective of the armed forces, because it would provide training in dealing with a mixed-gender army. U.S. Ex. 68.

2. Coeducation would have some effect on the educational programs at VMI. For example, women might suggest different reading in literature courses. This effect would not be likely to change either the quality or the mission of VMI. Tr. 365-66 (Conrad).

L. *ROTC Programs*

1. To enroll in the Air Force ROTC program, a cadet must pass the Air Force officer qualifying test, a 5½ hour test that resembles the SAT. This is the same test administered to every Air Force officer candidate throughout the United States. The test can be retaken up to three times, with six-month intervals between each. About 15% of the cadets fail the test the first time. Tr. 218-20 (Williams).

2. Cadets must also pass a physical, which is set by the Department of Defense and administered to all applicants for commissioning in the armed forces. Tr. 222.

3. The academic requirements for VMI's Air Force ROTC program are the same as those at any other undergraduate institution in the United States. Tr. 223.

4. The Air Force ROTC program also includes weekly leadership labs, which is partially waived at VMI because VMI "picks up the responsibilities for training our cadets on the techniques of marching, drill, those types of things." Leadership lab is required by the Air Force of all ROTC cadets. Tr. 223-24 (Williams).

5. The Air Force ROTC physical fitness test given to VMI cadets is the same test that is administered by any other undergraduate institution of higher education which offers ROTC to all students in that program. If a cadet cannot pass the physical fitness test by the end of his sophomore year, he cannot attend the summer field training. If he does not attend the field training, he cannot become an officer. The Air Force sets the requirements for the physical fitness test. With the exception of pull-ups, women and men perform the same events in this test; women do the flex arm hang rather than pull-ups. Scoring of the events is different for men and women. Tr. 225-29 (Williams).

6. The summer field training program is a "four-week summer encampment," and he likened it to "a modified rat line." Women attend the same camps, are subject to the same "modified rat line," participate in the leadership reaction course work, and participate in the other physical training he described. Approximately 25 to 30 female ROTC students would participate in the same training as men at each summer camp at each base. Thus, VMI cadets attend and take the summer camp training side by side with females. Tr. 229-32 (Williams).

7. Students in the University of Virginia's Army ROTC program are required to take certain ROTC classes, including a leadership laboratory once a week, as well as a two-day field training exercise each semester. They are required to participate in a physical training program of their own choosing. Each semester they must take and satisfactorily complete the Army physical training test. Tr. 247-48 (Randall).

8. All ROTC students must take and pass the Army physical fitness examination several times, including prior to summer training camp. Tr. 249-50, 253. Male and female students take the ROTC academic courses, and do the same exercises for the physical fitness exam. Tr. 254. Standards for the physical fitness examination differ by age and sex. Tr. 253 (Randall).

9. Cadets must attend the summer training camp between their junior and senior year. The six-week evaluation and training program is "very strenuous." Both male and female ROTC students participate in summer training, both are subject to the same physical stress, and both successfully complete the program. Tr. 257-62 (Randall).

10. Seventy-four students participate in the Army ROTC program at the University of Virginia (UVA), 11 of whom are females. Tr. 253-54 (Randall).

11. The Air Force ROTC requirements at UVA are substantially the same as those at VMI. UVA Air Force ROTC students participate in the summer training camp as VMI cadets, and female students successfully complete the program. Tr. 273, 275. Of 90 cadets participating in the UVA Air Force ROTC program, 19 are females. Tr. 273 (Stickell).

M. *Physical Facilities*

1. Defendants stipulated that "the VMI Barracks can be altered from a physical point of view to accommodate females." Tr. 414 (statement of counsel).

2. At West Point, male and female cadets occupy identical rooms side by side in the barracks. There are no designations as to which rooms are occupied by males or females, and separate gang shower rooms and gang toilet rooms are used by males and females. There are no differences between the facilities for men and women. Tr. 421-23 (Brewer).

3. With the exception of the fact that cadets at VMI roll up their mattresses during the day, the cadet rooms at VMI are similar to the cadet rooms at West Point. Tr. 424 (Brewer).

4. At VPI, there are two cadet residence halls. Male and female cadets occupy the same floors and, in some instances, they have rooms adjacent to one another. Separate but identical gang shower and toilet facilities are used by male and female cadets. One gang shower and toilet room was used by both male and female cadets, at different times. When women use this facility, a sign entitled "women" is hung on the door. Tr. 425-27 (Brewer).

5. There are no differences in the physical accommodations for VPI cadets on the basis of gender. All cadet rooms are identical. Tr. 426, 469 (Brewer).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUITNo. 91-1690
CA-90-126-RUNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.COMMONWEALTH OF VIRGINIA; LAWRENCE DOUGLAS WILDER, Governor of the Commonwealth of Virginia; VIRGINIA MILITARY INSTITUTE; JOSEPH M. SPIVEY, III, President of the Virginia Military Institute Board of Visitors; JOHN WILLIAMS KNAPP, Superintendent of Virginia Military Institute; THE BOARD OF VISITORS OF VIRGINIA MILITARY INSTITUTE; THOMAS N. DOWNING; ELIZABETH P. HOISINGTON, Brig. Gen.; ROBERT Q. MARSTON; A. COURTLAND SPOTTS, III; DANIEL F. FLOWERS; B. POWELL HARRISON, JR.; ROBERT H. SPILMAN; SAMUEL E. WOOLWINE; JAMES W. ENOCHS, JR.; WILLIAM A. HAZEL; HARVEY S. SADOW; DOUGLAS K. BAUMGARTNER; DANIEL D. CAMERON; GLEN N. JONES; JOHN W. ROBERTS, Members of the Board of Visitors of Virginia Military Institute; VMI FOUNDATION, INCORPORATED; VMI ALUMNI ASSOCIATION,
Defendants-Appellees,

and

GORDON K. DAVIES, Director of the Virginia State Council of Higher Education; THE VIRGINIA STATE COUNCIL OF HIGHER EDUCATION AND ITS MEMBERS AND OFFICERS,
Defendants.

VIRGINIA WOMEN ATTORNEYS ASSOCIATION; VIRGINIA CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; VIRGINIA CHAPTER OF THE OLDER WOMEN'S LEAGUE; VIRGINIA FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INCORPORATED; FRIENDS OF VMI FOR EQUALITY; ALEXANDER W. ASTIN; AMERICAN CIVIL LIBERTIES UNION; ACLU FOUNDATION OF VIRGINIA; NATIONAL WOMEN'S LAW CENTER; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; CENTER FOR WOMEN POLICY STUDIES; NATIONAL ORGANIZATION FOR WOMEN; NOW LEGAL DEFENSE AND EDUCATION FUND; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; VIRGINIA NOW LEGAL DEFENSE AND EDUCATION FUND, INCORPORATED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND,

Amici Curiae.

[Filed November 17, 1992]

On Petition for Rehearing with Suggestion for
Rehearing In Banc

Appellees filed a petition for rehearing with suggestion for rehearing in banc and appellant filed an answer to the petition. A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Widener and Hamilton voted to rehear the case in banc, and Chief Judge Ervin and Judges Russell, Hall, Phillips, Murnaghan, Wilkins, Niemeyer, and Williams voted to deny a rehearing in banc. Judges Wilkinson and Luttig did not participate in the decision.

The original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Niemeyer, with the concurrence of Judge Phillips and Judge Ward, Senior United States District Judge, sitting by designation.

For the Court,

/s/ Bert M. Montague
Clerk

John William Boland, Esq.
McGUIRE, WOODS, BATTLE & BOOTHE
1 James Center
901 East Cary Street
Richmond, VA 23219

APPENDIX E

STATUTORY PROVISIONS INVOLVED

Va. Code § 23-92. Virginia Military Institute continued.

—The military school established in the County of Rockbridge, at the Town of Lexington, shall be continued, and the visitors thereof and their successors shall be and remain a corporation under the style of "Virginia Military Institute," and shall be at all times subject to the control of the General Assembly. For the support of the school there shall be paid out of the public treasury, from time to time, such sums as shall be appropriated therefor by the General Assembly. (Code 1919, § 834; 1968, c. 719.)

Va. Code § 23-104. Admission of pay cadets; course of instruction, etc.—The board of visitors shall prescribe the terms upon which cadets may be admitted, their number, the course of their instruction, the nature of their service, and the duration thereof. (Code 1919, § 844.)

No. 92-1213

Supreme Court, U.S.

FILED

APR 20 1993

CLERK OF THE COURT

In the Supreme Court of the United States

OCTOBER TERM, 1992

VIRGINIA MILITARY INSTITUTE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

JESSICA DUNSAY SILVER

THOMAS E. CHANDLER

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 514-2217

QUESTION PRESENTED

Whether the male-only admissions policy of the Virginia Military Institute violates the Equal Protection Clause under the test set forth in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

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In the Supreme Court of the United States

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VIRGINIA MILITARY INSTITUTE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 976 F.2d 890. The opinion of the district court (Pet. App. 23a-101a) is reported at 766 F. Supp. 1407.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1992. A petition for rehearing was denied on November 17, 1992. Pet. App. 102a-104a. The petition for a writ of certiorari was filed on January 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

STATEMENT

1. The Virginia Military Institute (VMI), located in Lexington, Virginia, is one of 15 public four-year colleges in Virginia. At one time, most of Virginia's public colleges were single-sex, but now all of them except VMI are coeducational. Since its founding in 1839 as the nation's first state military college, VMI has admitted only men to its four-year undergraduate degree program. Pet. App. 4a, 5a-6a, 8a. The male-only admissions policy is not dictated by state law. Rather, the policy has been perpetuated by VMI's 17-member Board of Visitors, to which state law has delegated authority for setting admissions policy. Va. Code Ann. § 23-104 (1985). Despite its male-only admissions policy, VMI received letters inquiring about admission and other indications of interest from 347 women between the fall of 1988 and the summer of 1990. Pet. App. 5a-6a, 8a, 68a, 87a. Under current practice, however, VMI does not respond to written inquiries from women. *Id.* at 87a.

VMI's stated mission is to produce "citizen-soldiers," which it describes as "educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary." Pet. App. 6a. VMI seeks to fulfill this mission through a program based on the "adversative" model of education. That program, which is not offered elsewhere in Virginia, emphasizes physical rigor, mental stress, equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of values. *Id.* at 6a-7a, 17a-18a. Pursuant to the program, VMI—alone among Virginia's public colleges—requires all students to wear military uniforms, participate in military drills and parades, complete

courses in either military science, naval science, or aerospace studies, and live together in one large barracks. *Id.* at 7a-8a, 61a-62a.

2. The United States filed this action pursuant to 42 U.S.C. 2000c-6 in the United States District Court for the Western District of Virginia in March 1990. The complaint named as defendants, *inter alia*, the Commonwealth of Virginia, the Governor of Virginia, VMI, its Superintendent, and its Board of Visitors. The complaint alleged that VMI's male-only admissions policy violates the Equal Protection Clause of the Fourteenth Amendment. The complaint sought an order enjoining the defendants from discriminating on the basis of sex in the operation of VMI, including its admissions policy. Pet. App. 8a-9a.

The Commonwealth's Attorney General filed an answer on behalf of the Commonwealth, VMI, its Board of Visitors, and its Superintendent. The answer admitted that the Board of Visitors has a policy of admitting only males to the undergraduate program. C.A. App. 29. The Governor filed a separate answer, stating that "the failure to admit females to the Institution is against his personal philosophy," and that "no person should be denied admittance to a State supported school because of his or her gender." *Id.* at 41.¹ The Governor also stated he would "abide by the decision of the Court to the full extent of his authority." *Id.* at 42.

¹ The Attorney General was granted an "order of exemption" relieving her of the duty to represent the Governor in this litigation; the order was based on the Governor's finding that the Attorney General could not represent both the Governor's interests and those of the other defendants, "those interests not being the same." C.A. App. 129.

As a result of the Governor's answer, the Attorney General withdrew as counsel for the Commonwealth, VMI, its Superintendent, and its Board of Visitors, asserting that the Commonwealth's position conflicted with the position of the remaining defendants. Pet. App. 9a. As the Attorney General explained in a letter to the Governor, the Governor's answer provided "persuasive" evidence of the Commonwealth's policy regarding single-sex education, in the absence of a statute expressing its policy; however, the Governor's position—i.e., "that VMI's admission policy serves no legitimate public policy objective," C.A. App. 131—conflicted with the only viable legal defense available to VMI—i.e., "that VMI's status as a single-gender institution serves the important policy objective of the Commonwealth in promoting educational diversity," *ibid.* Upon withdrawing, the Attorney General appointed private counsel to represent the Commonwealth. *Id.* at 134.

Before trial, the Commonwealth was granted a "stay" relieving it of the duty to appear at trial on the condition that it agree to be bound by any ruling of the court. In addition, the Governor was relieved of the duty to testify at trial. Thus, the only state entity that offered a justification for VMI's male-only admissions policy was VMI's Board of Visitors. Pet. App. 9a.²

3. On June 14, 1991, the district court entered judgment in favor of the defendants. Pet. App. 23a-101a. Although the court found that "[w]omen are denied a unique educational opportunity that is avail-

² Petitioners are defendants VMI, its Board of Visitors, and its Superintendent, together with intervenor-defendants VMI Foundation, Inc., and the VMI Alumni Association.

able only at VMI," *id.* at 78a, it concluded that VMI's male-only admissions policy met the test for permissible gender classifications set forth in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), Pet. App. 40a. Under that test, "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of * * * showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" 458 U.S. at 724 (quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)).

The court first considered the purported state objective served by VMI's admissions policy. The court determined that "diversity in education" is a "legitimate objective" for a State to pursue. Pet. App. 32a. It further determined, in light of evidence that "[b]oth men and women can benefit from a single-sex education," that single-sex education is a legitimate form of diversity. *Id.* at 38a. In the court's view, the evidence of the benefits of single-sex education "fully justified" VMI's exclusion of women, "even without taking into consideration the other unique features of VMI's method of teaching and training." *Id.* at 34a. The court was also impressed by the "unique" nature of VMI's program. *Id.* at 37a. The court concluded that "both VMI's single-sex status and its distinctive educational method represent legitimate contributions to diversity in the Virginia higher education system." *Ibid.*

The court next determined that VMI's male-only admissions policy was "substantially related" to the achievement of educational diversity because

"[VMI's] single-sex status would be lost, and some aspects of the distinctive method would be altered if it were to admit women." Pet. App. 37a. Specifically, the court believed that VMI would have to adopt less stringent physical education requirements for women, even though the court credited "[e]xpert testimony establish[ing] that * * * some women are capable of all of the individual activities required of VMI cadets." *Id.* at 34a. In addition, the court found that female students would distract male students from their studies and create other new stresses. The court further found that VMI would have to alter its facilities to allow men and women privacy from the other gender during activities such as undressing and showering. *Id.* at 34a-36a. The court concluded that those changes "provide sufficient constitutional justification for continuing the single-sex policy." *Id.* at 36a.

4. The court of appeals vacated and remanded. Pet. App. 1a-22a. It agreed with the district court's conclusion "that single-sex education is pedagogically justifiable" because it can benefit both men and women. *Id.* at 17a. The court of appeals also found adequate support for the district court's finding that VMI would change significantly if women were admitted. *Id.* at 14a. But those changes, the court of appeals determined, would stem not from the presence of women, but from the shift to coeducation:

It is not the maleness, as distinguished from femaleness, that provides justification for [VMI's] program. It is the homogeneity of gender in the process, regardless of which sex is considered, that has been shown to be related to the essence of the education and training at VMI.

Id. at 15a. The court of appeals explained that "[t]he problems that could be anticipated by coeducation at VMI, which are suggested by VMI generally to rise from physiological differences between men and women, needs for privacy, and cross-sexual confrontations, would not be anticipated in an all-female program with the same mission and methodology as that of VMI." *Id.* at 16a-17a. Given its conclusion that the integrity of VMI's program depended on single-genderedness (as opposed to maleness) and "[t]he parties['] agree[ment]" that the program "makes a positive contribution offered by no other institution," *id.* at 17a, the court framed the "decisive question" under *Hogan* as "why [Virginia] offers the unique benefit of VMI's type of education and training to men and not to women," *id.* at 18a.

The court concluded that the Commonwealth "failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women." Pet. App. 21a. The court observed that the record contained no "stated policy justifying single-sex education in state-supported colleges and universities." *Id.* at 19a. The court determined that, in any event, "[i]f VMI's male-only admissions policy is in furtherance of a state policy of 'diversity,' the explanation of how the policy is furthered by affording a unique educational benefit only to males is lacking." *Ibid.* The court reasoned that "[a] policy of diversity which aims to provide a[n] array of educational opportunities, including single-gender institutions, must do more than favor one gender." *Id.* at 19a-20a. The court concluded that the Commonwealth's policy of offering a VMI-type education to men but not to women was not shown to achieve any objective be-

yond favoring men with an educational choice not available to women. *Id.* at 20a-21a.

Although it found a violation of the Equal Protection Clause, the court of appeals declined, "[i]n light of * * * the generally recognized benefit that VMI provides," to "order that women be admitted to VMI if alternatives are available." Pet. App. 21a. The court instead "remand[ed] the case to the district court to give to the Commonwealth the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied." *Ibid.* The court of appeals emphasized, in particular, that "[b]y commenting on the potential benefits of single-gender education * * *, [it] d[id] not mean to suggest the specific remedial course that the Commonwealth should or must follow hereafter." *Ibid.* Thus, the court stated that, consistently with its opinion, "the Commonwealth might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution." *Ibid.* The court added that "there might be other more creative options or combinations." *Ibid.*

ARGUMENT

Contrary to petitioners' assertion (Pet. 9), this case does not present the question whether it is constitutional for public schools to adopt single-sex admissions policies. That question is not presented because the court of appeals did not base its decision on VMI's failure to justify its male-only admissions policy. Instead, the court based its decision on the failure of the Commonwealth of Virginia "to articu-

late an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women." Pet. App. 20a-21a. That was a proper basis for the court's holding that the Commonwealth was violating the Equal Protection Clause. That holding, moreover, reflects a straightforward, fact-bound application of the test for gender classifications set out in *Hogan*, and it does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. As the parties and the courts below recognized, this Court's decision in *Hogan* supplies the test for determining whether VMI's male-only admissions policy violates the Equal Protection Clause of the Fourteenth Amendment. Under the *Hogan* test, the Commonwealth had the burden of showing that VMI's exclusion of women (1) serves important governmental objectives and (2) is substantially related to the achievement of those objectives. See *Hogan*, 458 U.S. at 724. The court of appeals correctly concluded that the Commonwealth failed to make either showing.

a. Under the first part of the *Hogan* test, the State must articulate an important governmental objective and "establish that the alleged objective is the actual purpose underlying the discriminatory classification." *Hogan*, 458 U.S. at 730. Thus, it was proper for the court of appeals not to accept uncritically VMI's allegation that the purpose of its male-only admissions policy was to promote a state policy of diversity. Looking beyond that allegation, the court correctly discerned a "lack of a state-announced policy to justify gender classifications." Pet. App. 19a.

As the court observed, the Commonwealth has not expressed a policy favoring gender diversity. The only official statement in the record on this subject, which was set out in the report of the Commission on the University of the 21st Century, did not support single-sex education; rather, it emphasized the importance of non-discrimination. Pet. App. 19a (quoting report statement that "it is extremely important that [colleges and universities] deal with faculty, staff, and students without regard to sex, race, or ethnic origin"). Moreover, the Attorney General of the Commonwealth determined that the Commonwealth did not have a policy favoring single-sex education. The absence of such a policy was what led the Attorney General to conclude that the Governor's opposition to VMI's male-only admissions policy represented state policy.

In concluding that there was no state policy favoring gender diversity, the court of appeals did not rely solely on the Commonwealth's failure to articulate such a policy. The court also took into account "the movement away from gender diversity in Virginia by public colleges and universities." Pet. App. 20a. As the court correctly reasoned, it is difficult to believe that VMI's male-only admissions policy has been retained as a result of a state policy favoring gender diversity when, over the same period, the other public colleges and universities in Virginia have moved to coeducation. *Ibid.* It is more likely, the court of appeals determined, that the retention of VMI's admissions policy stems from "delegation or inaction." *Id.* at 21a. Thus, the Commonwealth failed to satisfy *Hogan* by showing that its practice of offering a VMI-type education only to men was the product of "reasoned analysis" rather than the per-

petuation of "traditional, often inaccurate, assumptions about the proper roles of men and women." 458 U.S. at 726. As the court of appeals observed, "the Commonwealth of Virginia has not revealed a policy that explains why it offers the unique benefit of VMI's type of education and training to men and not to women." Pet. App. 18a.

b. The court of appeals was also correct in holding that even if the Commonwealth had a policy of gender diversity, VMI's exclusion of women was not substantially related to the achievement of that policy. As the court of appeals recognized, the Commonwealth could not establish the requisite "substantial relationship" merely by showing that male students would be deprived of the benefit of a VMI-type education if women were admitted because their admission would change the nature of the program. As the court stated, "[a] policy of diversity which aims to provide a[n] array of educational opportunities, including single-gender institutions, must do more than favor one gender." Pet. App. 19a-20a.

That conclusion follows directly from *Hogan*. There, this Court rejected the dissent's argument that the female-only admissions policy of the Mississippi University for Women's School of Nursing was justified by the State's interest in giving women the choice of attending an all-female school:

Since any gender-based classification provides one class a benefit or choice not available to the other class, * * * that argument begs the question. The issue is not whether the benefited class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.

458 U.S. at 731 n.17. The Court framed the relevant issue in a similar way in *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980), where the Court struck down a Missouri workers' compensation provision that required widowers, but not widows, to prove dependence on a deceased spouse in order to receive benefits:

Providing for needy spouses is surely an important governmental objective, and the Missouri statute effects that goal by paying benefits to all surviving female spouses and to all surviving male spouses who prove their dependency. But the question remains whether the discriminatory means employed—discrimination against women wage earners and surviving male spouses—itself substantially serves the statutory end. Surely the needs of surviving widows and widowers would be completely served either by paying benefits to all members of both classes or by paying benefits only to those members of either class who can demonstrate their need. Why, then, employ the discriminatory means of paying all surviving widows without requiring proof of dependency, but paying only those widowers who make the required demonstration?

446 U.S. at 151 (citation omitted).

So too here, it is possible that the Commonwealth's support of a VMI-type program enhances the array of educational choices for men. But, as the court of appeals apprehended, the question remains "why the Commonwealth of Virginia offers the opportunity [for a VMI-type education] only to men." Pet. App. 18a. The Commonwealth did not supply a satisfactory answer to that question.

c. Petitioners contend that in requiring the Commonwealth to justify offering a VMI-type education

only to men, the court of appeals imposed an "additional constitutional requirement" beyond those set forth in *Hogan*. Pet. 15. In petitioners' view, the *Hogan* test is satisfied "where a school's single-sex educational program confers benefits beyond those available in a coeducational setting." Pet. 12. Petitioners are mistaken.

As explained above, *Hogan* itself rejects the notion that a State may overcome an equal protection challenge merely by showing that the challenged classification confers a benefit on the favored gender; the State must also justify favoring that gender alone. To the same effect is *Wengler*, where the Court made clear that the classification itself must substantially further a legitimate state goal. Under *Hogan* and *Wengler*, it was not sufficient for VMI to show that its male-only admissions policy bore a substantial relationship to its institutional mission of producing "citizen-soldiers," as the court of appeals recognized, Pet. App. 17a. The Commonwealth was required to show that offering a VMI-type education only to men, but not to women, was substantially related to promoting diversity in Virginia's educational system.³

³ Petitioners attempt (Pet. 15) to glean significance from the fact that this Court in *Hogan* affirmed the Fifth Circuit's decision but did not expressly adopt its reasoning. That effort is misguided. The Fifth Circuit in *Hogan* rejected the State's argument that its nursing school's female-only admissions policy furthered a legitimate interest by increasing the range of educational opportunities for women. *Hogan v. Mississippi Univ. for Women*, 646 F.2d 1116, 1118-1119 (1981), aff'd, 458 U.S. 718 (1982). The Fifth Circuit stated that "[t]he problem with providing a unique educational opportunity for females but not for males is that such an approach does not bear a substantial relationship to th[e]

d. Petitioners also argue that the Commonwealth was justified in offering a VMI-type education only to men because "women would be unlikely to benefit from the adversative model of education offered at VMI," and there is "little or no demand" among women for a VMI-type program. Pet. 12-13. That argument is without merit.

First, neither the record nor the decisions below support petitioners' sweeping assertions regarding women's need and desire for a VMI-type education. In fact, the district court credited expert testimony stating that some women would benefit from a VMI-type education. Pet. App. 82a. It also found that "some women, at least, would want to attend [VMI] if they had the opportunity" (*id.* at 38a), and that "some women are capable of all of the individual activities required of VMI cadets" (*id.* at 34a). Moreover, the court of appeals determined that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women." *Id.* at 21a.⁴ Thus, petitioners are wrong in

important objective [of providing an education for all state citizens]." 646 F.2d at 1119. The substance of that statement was accepted by this Court. See *Hogan*, 458 U.S. at 731 n.17, quoted at page 11, *supra*. This Court understandably focused, however, on Mississippi's "primary justification" for the discriminatory admissions policy, which (in this Court) was that the policy remedied past discrimination. 458 U.S. at 727-731.

⁴ See also Pet. App. 16a ("Both men and women appear to have benefited from single-sex education in a materially similar manner. The evidence about the VMI system suggests no differently."); *id.* at 18a ("Although it is readily apparent from the evidence that the rigor of the physical training at VMI is tailored to males, in the context of a single-sex female

suggesting that no women would benefit from, and that virtually no women would choose, a VMI-type education.

In any event, the gender-based generalizations upon which petitioners rely cannot justify the practice challenged here. To be sure, the evidence suggested that because of physiological differences, a greater proportion of men than women would be able to meet VMI's physical education requirements. See Pet. App. 78a-82a. That does not, however, justify the fact that *no* women, even those who can meet the physical education requirements, are offered the opportunity for a public education program of the kind offered at VMI. In similar circumstances, this Court has held that generalizations about a protected group cannot support discriminatory classifications. See *Wengler*, 446 U.S. at 151; see also, *e.g.*, *Orr v. Orr*, 440 U.S. 268, 281-282 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 204-207 (1977) (opinion of Brennan, J.); *id.* at 223-224 (Stevens, J., concurring in judgment); *Craig v. Boren*, 429 U.S. 190, 198-199 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 686-687 (1973).

e. Petitioners also assert that the court of appeals "effectively held that a state cannot operate a single-sex school unless it operates at least *two* single-sex schools, one for men and one for women, offering the same type of educational program." Pet. 12; cf. Pet. 8 ("The appeals court held * * * that VMI's single-sex admissions policy violated the Fourteenth Amendment because the Commonwealth had not provided a

institution, it could be adjusted without detrimental effect. No other aspect of the program has been shown to depend upon maleness rather than single-genderedness.").

similar type of educational institution for women.") (emphasis added). At the same time, however, petitioners "do not doubt that states are required to provide generally comparable educational opportunities to men and women." Pet. 14. Petitioners apparently seek to draw a constitutional distinction between offering "generally comparable educational opportunities," which they concede is required, and offering "the same [or similar] type of educational program," which they argue is not.

Whether the Constitution draws such a distinction is not at issue in this case. Petitioners conceded below that there is no educational program comparable to VMI's; indeed, they consistently described VMI as "unique." See Pet. App. 17a & n.8; see also, *e.g.*, Pet. C.A. Br. 2, 21-24. In this Court, although they state (Pet. 14) that women can participate in the residential military college at Virginia Polytechnic Institute and State University (VPI), they do not contend that VPI is comparable to VMI, nor could they do so. The district court found that "[w]omen are denied a unique educational opportunity that is available only at VMI," Pet. App. 78a, and that the "military barracks at [VPI] are dramatically different institutions that offer dramatically different experiences" from those of VMI, *id.* at 54a. Petitioners' concession that States must provide generally comparable educational opportunities for men and women, and that there is no state program for women comparable to VMI's, supports the court of appeals' conclusion that the present state of affairs is unconstitutional.⁵

⁵ The United States brought suit in this case challenging VMI's admissions policy and seeking the admission of women to VMI. See C.A. App. 23 (Compl. ¶ 15). The United States

2. Petitioners contend that the court of appeals' decision conflicts with decisions in other circuits addressing claims of sex discrimination in high school sports programs. Pet. 15-17. Those decisions, however, are inapposite.

Several of the decisions cited by petitioners hold that a school may, consistently with the Equal Protection Clause, have an all-girl sports team without having a corresponding all-boy team. For example, in the decision upon which petitioners principally rely (Pet. 16-17), *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (1982), cert. denied, 464 U.S. 818 (1983), the Ninth Circuit rejected an Equal Protection Clause challenge by boys to their exclusion from their high school's only volleyball team, which was all-girl. Applying the *Hogan* test, the Ninth Circuit held that the claimed governmental interest in "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes" was a "legitimate and important governmental interest." 695 F.2d at 1131. Turning to the second part of the *Hogan* test, the court deter-

did not seek the creation of a separate institution or program for women, and the Commonwealth never suggested that it intended to create one. See Pet. App. 38a. Although the court of appeals commented on "the potential benefits of single-gender education," it carefully refrained from "suggest[ing] the specific remedial course that the Commonwealth should or must follow hereafter." *Id.* at 21a. Because the required remedy has yet to be resolved, this case does not present the question of the appropriateness of "separate but equal" schools for men and women. Although we do not believe that further review is warranted in this case, we reserve the argument that the court of appeals erred in suggesting that the Commonwealth has the option of creating an all-female, VMI-type institution.

mined from evidence of physiological differences between the sexes that boys would displace most of the girls if the boys were allowed to try out for the team. *Ibid.* Based on that determination, the court held that there was a "substantial relationship between the exclusion of males from the team and the goal of redressing past discrimination and providing equal opportunities for women." *Ibid.*

Clark and the other cases rejecting challenges by boys to all-girl teams (see Pet. 17 n.18) are readily distinguishable from this case. First, *Clark* and cases like it rest on the government objective of remedying past discrimination. None of the defendants here has suggested that VMI's male-only admissions policy was designed to remedy past discrimination. Second, this case involves college students, not high school students. Cf. *United States v. Fordice*, 112 S. Ct. 2727, 2736 (1992) ("[A] state university system is quite different in very relevant respects from primary and secondary schools."). Finally, although both this case and cases such as *Clark* involve evidence concerning physiological differences between males and females, it is far from clear that the evidence has the same significance in both the athletic and the academic settings.⁶

⁶ In cases in which girls seek to participate on all-boy sports teams in the absence of a corresponding team for girls, the courts have uniformly held that girls cannot be wholly excluded from such teams, but instead must be allowed to compete for a position. See Pet. 16 n.17 (citing cases). In those cases, courts typically reason that paternalistic attitudes about females, safety concerns, and gender-based generalizations do not justify prohibiting individual females from trying out for a sports team on an equal basis with males. See, *Force by Force v. Pierce City R-VI School Dist.*, 570 F. Supp. 1020, 1028-1029 (W.D. Mo. 1983). As petitioners recognize

3. Petitioners assert that review by this Court is warranted because this case presents an issue "that arises frequently in the lower courts and is likely to continue to arise in a number of contexts." Pet. 18. That assertion does not withstand scrutiny.

The court of appeals' decision represents a straightforward application of the *Hogan* test to the facts of this case. Those facts primarily involve VMI, an institution that petitioners have consistently described as "unique." See page 16, *supra*. The court of appeals' opinion was narrowly written, resting heavily, for example, on the absence of evidence of a state-enunciated policy favoring single-sex education. Pet. App. 17a-20a. Thus, the decision below simply does not break any new ground.

Moreover, there are only three other single-sex public colleges in the nation. Pet. App. 52a; Pet. 18 n.19. Two of them have female-only admissions policies; a *Hogan* analysis of those policies would likely involve different factors from those involved here, such as whether the exclusion of males was justified as a remedy for past discrimination against women. For that reason, the legality of those schools' single-gender policies is not likely to be resolved by further review in the instant case. There is only one other all-male

(Pet. 16), decisions such as *Force by Force* do not conflict with the decision below. Nor does the remaining decision cited by petitioners, *Cape v. Tennessee Secondary School Athletic Ass'n*, 563 F.2d 793 (6th Cir. 1977), conflict with the decision below. *Cape* rejected a girl's equal protection challenge to an athletic association's use of different rules for boys and girls basketball games, holding that the association was not required to adopt the plaintiff's "personal notions as to how the game of basketball should be played." *Id.* at 795. *Cape* is inapposite for the same reasons as are the other cases involving high school sports teams.

public college besides VMI, and the fact that a challenge to its single-gender policy might raise issues similar to those of this case does not, standing alone, warrant further review.⁷

For reasons discussed above, the court of appeals' decision has no special relevance for cases involving primary and secondary education. See page 18, *supra*. In particular, the decision is not dispositive of the validity of primary or secondary education systems that offer comparable single-sex programs to both males and females under a diversity or remedial rationale.⁸

⁷ The Citadel has a male-only admissions policy that is the subject of two pending actions. *Johnson v. Jones*, Civ. No. 2:92-1674-2 (D.S.C., complaint filed June 11, 1992); *Faulkner v. Jones*, C.A. No. 2:93-0488-2 (D.S.C., complaint filed Mar. 2, 1993).

⁸ Petitioners note (Pet. 10) that this Court has twice before addressed claims involving single-sex education, and in each case the lower court's decision permitting single-sex education was affirmed without an opinion. See *Vorchheimer v. School Dist.*, 532 F.2d 880 (3d Cir. 1976), *aff'd* by an equally divided Court, 430 U.S. 703 (1977); *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971). Those decisions do not support the Commonwealth's practice of offering a distinctive education program only to one gender under a policy of gender diversity. In *Vorchheimer*, a girl sought admission to an all-male public high school. The school system, however, also had an all-female public high school (as well as coeducational high schools) that offered similar courses of equal quality. 532 F.2d at 881-882. Thus, the plaintiff "d[id] not allege a deprivation of an education equal to that which the school board makes available to boys." *Id.* at 886. In *Williams*, men sought admission to a state-supported college for women. The State's system of higher education, however, also offered a school for women, and the court found that there were no

Finally, the decision below plainly has only limited bearing on the validity of single-sex prisons and similar facilities. Compare *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989) (addressing claim of gender discrimination in prisons).

* * * * *

In sum, the court of appeals properly applied the *Hogan* test and correctly concluded that the Commonwealth of Virginia failed to justify offering a VMI-type education to men but not to women.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

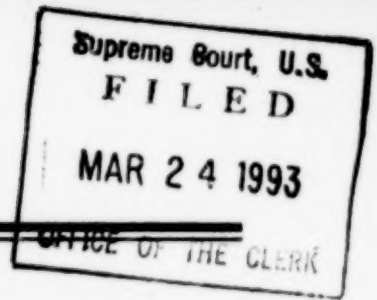
JAMES P. TURNER
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys

APRIL 1993

special features that made the women's college better than the men's college. 316 F. Supp. at 136-138. It should also be noted that *Williams* was decided when gender classifications were analyzed under a rational basis test. Because *Vorchheimer* and *Williams* did not involve the issue presented here, the decisions in those cases does not impugn the decision below, and the grant of certiorari in *Vorchheimer* and the summary affirmance in *Williams* do not support further review in this case.

No. 92-1213



IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

VIRGINIA MILITARY INSTITUTE, *et al.*,
v. *Petitioners,*
UNITED STATES OF AMERICA,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

**BRIEF *AMICI CURIAE* OF WELLS COLLEGE,
RANDOLPH-MACON WOMAN'S COLLEGE,
SWEET BRIAR COLLEGE, AND HOLLINS COLLEGE
IN SUPPORT OF PETITIONERS**

DAVID M. LASCELL
Counsel of Record
DANDREA LYNN RUHLMANN
HALLENBECK, LASCELL & PINEO
73 State Street
Rochester, NY 14614
(716) 423-5900
Counsel for Amici Curiae
Wells College,
Randolph-Macon Woman's College,
Sweet Briar College, and
Hollins College

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1213

VIRGINIA MILITARY INSTITUTE, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF *AMICI CURIAE* OF WELLS COLLEGE,
RANDOLPH-MACON WOMAN'S COLLEGE,
SWEET BRIAR COLLEGE, AND HOLLINS COLLEGE
IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

Wells College, founded in 1868, is a private woman's college which is located in Aurora, New York. Randolph-Macon Woman's College, founded in 1891, is located in Lynchburg, Virginia. Sweet Briar College, located in Sweet Briar, Virginia, is a woman's college which was founded in 1901. Hollins College, founded in 1842, is a woman's college at the undergraduate level in Roanoke,

Virginia. For almost a century, they have provided high quality education for women. They believe in single-sex education as a beneficial alternative to coeducational education, in either a college or university setting. Wells, Randolph-Macon, Sweet Briar, and Hollins believe that they and other single-sex educational institutions provide needed diversity in American postsecondary education.

Amici submit this brief to underscore the great importance of single-sex education and to emphasize the benefit of granting the Petition for Certiorari in this case.¹

SUMMARY OF ARGUMENT

Wells, Randolph-Macon, Sweet Briar, and Hollins have reaffirmed their mission as small private liberal arts colleges for women because they are convinced that single-sex education for women provides successful training for women. The Fourth Circuit Court of Appeals in this case has also acknowledged the benefit of single-sex education. Said the Fourth Circuit in this case:

Thus, while the data support a pedagogical justification for a single-sex education, they do not materially favor either sex. Both men *and* women appear to have benefited from single-sex education in a materially similar manner.

Pet. App. 16a (emphasis in original). Likewise, in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), this Court recognized the legal viability of single sex education. *Id.* at 728, 732 n.17.

Despite this Court's holding in *Mississippi University For Women*, however, several commentators seem to believe that public support of single-sex education is unconstitutional and that even a private institution will be unable to offer single-sex education if it receives federal

¹ Petitioners and respondent have consented to the filing of this brief. Copies of the parties' consent letters have been filed with the Clerk.

financial assistance, state aid or merely a state or federal tax exemption. Although the Second Circuit Court of Appeals (the Circuit in which Wells is located) has twice reaffirmed that such aid does not turn a private institution into a public one, *Albert v. Carovano*, 851 F.2d 561 (2d Cir. 1988); *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968), commentators seem to believe that a private institution, by accepting public benefits or largess, becomes subject to the same constitutional scrutiny as public institutions. Thus, argue these commentators, such institutions will be unable to offer single-sex education. *Amici* do not believe that this Court has made any such ruling, but they offer this brief in the belief that this Court should clear any doubt. This Court's decision in *Mississippi University for Women* and the District Court's findings in this case support the holdings there is a strong pedagogical justification for single-sex education.

ARGUMENT

SINGLE SEX EDUCATION PROVIDES SUBSTANTIAL BENEFIT TO WOMEN

As is amply demonstrated by the evidence considered by the District Court in this case, a large number of studies have confirmed the value and importance of single sex education. See, for example, Marvin Bressler & Peter Wendell, *The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations*, 51 J. Higher Educ. 650, 662 (1980), cited by the Circuit Court's opinion. Pet. App. 16a.

The Circuit Court acknowledged the merit of the studies and the testimony supporting them.

We are thus left with three conclusions (1) single-gender education, and VMI's program in particular, is justified by a legitimate and relevant institutional mission which favors neither sex . . .

Id. at 899.

The popular press also has reported an increasing awareness of the value of single-sex education. *See, e.g., A 90's Resurgence for Women's Colleges*, USA Today, Feb. 16, 1993. Against such a background, this Court cannot allow a misinterpretation of its holding in *Mississippi University for Women v. Hogan*, *supra*. Instead, it should reaffirm the value of single-sex education, hold firmly and clearly that it has its place in the American higher education system, and rule once again that educationally successful institutions like the *amici* and the petitioner may constitutionally offer single-sex education.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Certiorari, and allow the matter to be fully briefed and argued.

Respectfully submitted,

DAVID M. LASCELL

Counsel of Record

DANDREA LYNN RUHLMANN

HALLENBECK, LASCELL & PINEO

73 State Street

Rochester, NY 14614

(716) 423-5900

Counsel for Amici Curiae

Wells College,

Randolph-Macon Woman's College,

Sweet Briar College, and

Hollins College

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AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

CAROLYN B. KUHLMAN *

ANDREA M. GAUTHIER

MUNGER, TOLLES & OLSON

355 South Grand Avenue

Thirty-fifth Floor

Los Angeles, California 90071

(213) 683-9100

Counsel for Amici Curiae

March 24, 1993

* Counsel of Record

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INTEREST OF THE *AMICI CURIAE*

Mary Baldwin College is a private four-year liberal arts college for women in Staunton, Virginia. The college is committed to academic excellence and to the education of women in a time of expanding opportunities. Educational programs at the college are designed to provide the foundation for future careers and positions of leadership.

Saint Mary's College is a private two-year liberal arts college and upper level preparatory school for women in Raleigh, North Carolina. The college is dedicated to developing women's confidence and leadership skills, and preparing women for continued study toward a baccalaureate degree and future professional careers, and for lives in which they can be confident, adventurous, productive and fulfilled through their choices. The college offers a traditional liberal arts program.

Southern Virginia College for Women is a private two-year college for women in Buena Vista, Virginia. It is committed to preparing its students for continued study towards a baccalaureate degree, providing its students with career-oriented programs, and creating opportunities for each student to grow and learn in a supportive atmosphere that encourages the development of academic skills and self-confidence.

Amici are dedicated to single-sex education. As private women's colleges, they can attest that a single-sex environment offers women significant advantages that are unobtainable in a coeducational setting. *Amici* are concerned that the Fourth Circuit's decision in this case raises troubling constitutional issues that ultimately could threaten the viability of single-sex education for women.

SUMMARY OF ARGUMENT

Recent studies strongly suggest that single-sex education for women at the secondary and post-secondary level promotes women's academic and career achievement and encourages women to pursue traditionally male-dominated careers. In an era of educational crisis this country cannot afford to abandon successful educational programs such as those offered by the *amici*.

The current state of the law, including the opinion of the Fourth Circuit in this case, casts doubt on the constitutional validity of single-sex education for women. Women's colleges cannot continue to exist if the legal system refuses to recognize the legitimacy of the benefits of single-sex education for women. This Court should grant the petition for writ of *certiorari* in this case and uphold the constitutionality of single-sex education for women before the current legal uncertainty becomes a tool to eliminate institutions such as the *amici*.

ARGUMENT

I. RECENT STUDIES INDICATE THAT SINGLE-SEX EDUCATION PROVIDES SUBSTANTIAL BENEFITS TO WOMEN

Since the 1960's and 1970's the number of women's colleges in the United States has dwindled. In 1960, there were 268 women's colleges in the United States. C. RIORDAN, *GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE?* 37 (1990). Today, there are only about 56. Pet. App. 52a.

Although this movement away from single-sex education evolved from a variety of economic and societal concerns, those women's colleges that remain have not stood still in the past. The women's colleges of today do not perpetuate outmoded, stereotypical views of women. On the contrary, these colleges play a significant role in the education and development of highly successful

women, many of whom go on to pursue male-dominated careers.

An impressive body of recent studies on single-sex and mixed-sex education at both pre-college and college levels confirms the continued importance of these institutions in American education today. These studies demonstrate that single-sex schools lead to higher achievement and self-esteem in women, encourage women to pursue traditionally male-dominated careers, and alleviate some of the disadvantages women may suffer in a coeducational setting.

A. Single-Sex Education's Contribution to Higher Academic Achievement and Self-Esteem in Women

1. *Single-Sex Education Has A Positive Effect On Performance And Attitudes*

Recent studies analyzing questionnaire, performance test or school record data strongly suggest that, at both the secondary and college levels, women in single-sex schools not only outperform their peers in mixed-sex schools, but show higher levels of self-esteem and a greater sense of personal control.

In one of the most frequently cited of these studies, Professors Valerie Lee and Anthony Bryk compared the effects of single-sex and mixed-sex Catholic secondary schools on a number of specific variables, including areas of academic achievement, achievement gains, educational aspirations, self-image, sense of personal control over environment, and attitudes and behaviors related to academics.¹ See Lee & Bryk, *Effects of Single-Sex Secondary*

¹ Because of the scarcity of single-sex public schools in this country, several of the studies comparing single-sex and mixed-sex secondary schools have used data from private Catholic schools. For a discussion of the formal and informal structure of these Catholic schools, see C. RIORDAN, *GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE?* 62-81 (1990).

Schools on Student Achievements and Attitudes, 78 J. EDUC. PSYCHOLOGY 381 (1986) (hereinafter "Lee & Bryk (1986)"). Analyzing data from a longitudinal study of randomly-selected high school sophomores and seniors entitled "High School and Beyond," Professors Lee and Bryk "found that single-sex schools appear to deliver specific advantages to their students." *Id.* at 394. Relative to their peers in the coeducational schools, girls from the single-sex schools were more likely to "express specific interests in both mathematics and English," *id.* at 387, demonstrated "significantly greater gains in reading, science, and educational ambition over the course of their high school years," *id.* at 394, and had higher ratings for self-image and sense of personal control, *id.* at 386.

Professors Lee and Bryk attributed these positive results to the absence of distractions and pressures caused by members of the opposite sex:

[S]ingle-sex secondary schooling may in fact serve to sensitize young women to their occupational and societal potentials in an atmosphere free of some of the social pressures that female adolescents experience in the presence of the opposite sex. Adolescence is a critical period for the formation of attitudes about oneself. It may be that some separation of students' academic and social environments removes the distractions that can interfere with the academic development of some students.

Id. at 394. A follow-up study based on additional data obtained in the second and fourth years after graduation demonstrated that the beneficial effects of single-sex high school experience persisted into the college years. See Lee & Marks, *Sustained Effects of the Single-Sex Secondary School Experience on Attitudes, Behaviors, and Values in College*, 82 J. EDUC. PSYCHOLOGY 578 (190) (hereinafter "Lee & Marks").²

² Although most of the studies analyzing the "High School and Beyond" data have found significant advantages for single-sex

The work of Cornelius Riordan, an Associate Professor of Sociology at Providence College, supports these findings. Professor Riordan has conducted three recent studies on single-sex education which have culminated in a recently published book, *GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE?* (1990) (hereinafter "RIORDAN (1990)"). In the first of these studies, Professor Riordan analyzed data from the High School and Beyond survey to examine the influence of single-sex and mixed-sex Catholic school education on advanced mathematics, writing, science, civics, self-esteem, and sense of personal control. *Id.* at 82-113. The results significantly favored the single-sex schools. On average, girls in the single-sex schools "score[d] about one-third of a grade equivalent higher than girls in mixed-sex schools," scoring "almost one full year" higher in science. *Id.* at 112. Girls in the single-sex category also scored higher on measures of self-esteem and personal control than did the girls in the mixed-sex category. *Id.* at 109-10.³

schools, one study found no significant effects due to a single-sex education. See Marsh, *Effects of Attending Single-Sex and Co-educational High Schools On Achievement, Attitudes, Behaviors and Sex Differences*, 81 J. EDUC. PSYCHOLOGY 70 (1989). Professors Lee and Bryk have criticized this study on methodological grounds. See Lee & Bryk, *Effects of Single-Sex Schools: Response to Marsh*, 81 J. EDUC. PSYCHOLOGY 647 (1989).

³ The results of Professor Riordan's 1990 study are consistent with an earlier study in which he compared the effects of single-sex Catholic, mixed-sex Catholic, and mixed-sex public schools. See Riordan, *Public and Catholic Schooling: The Effects of Gender Context Policy*, 93 AM. J. EDUC. 518 (1985). Although Riordan found virtually no difference between the mixed-sex Catholic and mixed-sex public schools, the performance of students from the Catholic single-sex schools was significantly greater than the performance of students from the mixed-sex schools. Riordan concluded that "[o]n average, Catholic single-sex schools are nearly twice as effective as Catholic mixed-sex schools" and attributed this difference to the "reduced adolescent subculture" and the "greater availability of same-sex role models" found in the single-sex schools. *Id.* at 536.

In the second of his three studies, Professor Riordan investigated the long-term outcomes of single-sex education. *Id.* at 114-15, 129-34. This study analyzed questionnaire and performance test data from the National Longitudinal Study of the High School Class of 1972, a survey that recorded performance test and questionnaire data from high school seniors in the year 1972, and collected additional data from those same students for the years 1973, 1974, 1976, 1979 and 1986. Professor Riordan concluded that the beneficial effects of single-sex education on cognitive ability persist as many as seven years after graduation from high school. *Id.* at 134. In addition, the girls from the single-sex high schools "achieved higher education than their female counterparts from mixed-sex high schools." *Id.* at 134.

Professor Riordan's work also demonstrates that the benefits of single-sex education are not limited to the secondary school level. In the third of his three recent studies, he used the National Longitudinal Study of the Class of 1972 to compare data from women who had attended single-sex colleges with data from women who had attended mixed-sex colleges. *Id.* at 116-28, 133-34. The study found that "women's colleges have a very strong influence on both educational and occupational achievement." *Id.* at 133.

In analyzing the results of his extensive research, Professor Riordan has concluded that

[S]ingle-sex schools offer an environment that is more conducive to learning than mixed-sex schools, especially for women. They provide more role models for students, and they offer more order and control than mixed-sex schools. In all-girls schools, the adolescent climate is weak, allowing an academic climate to flourish.

Id. at 151.

Professor Riordan's results are consistent with a recent study by Daryl G. Smith, a Professor of Education

and Psychology at the Claremont Graduate School. See Smith, *Women's Colleges and Coed Colleges: Is There A Difference For Women?*, 61 J. HIGHER EDUC. 181 (1990). Analyzing data from students enrolled in single-sex and coeducational colleges in 1982 and questioned four years later, Professor Smith found that "women's colleges relate positively to a variety of measures of student satisfaction, perceived changes in skills and abilities, and educational aspirations and educational attainment." *Id.* at 191. Significantly, students from the women's colleges were more likely to obtain a degree from their institutions than their counterparts at the coeducational colleges. *Id.* at 191-92. Students from the women's colleges also gave high ratings to measures "having to do with the academic program of the institution and the contact with faculty and administration, as well as perceived changes in values of tolerance and cultural awareness." *Id.* at 191. The only area where students from coeducational schools rated their experience more positively than did students from the women's colleges was in the area of social life.⁴ *Id.* at 192.

⁴ Professor Smith analogized his findings to those of Professor Alexander Astin in *FOUR CRITICAL YEARS: EFFECTS OF COLLEGE ON BELIEFS, ATTITUDES, AND KNOWLEDGE* (1977). *FOUR CRITICAL YEARS* was a comprehensive study of educational environments that, like Smith's study, concluded that the single-sex environment produced significant advantages for its students. In a more recent study, Professor Astin has suggested that "institutional type, as such, has little direct effect on student development." See A. ASTIN, *WHAT MATTERS IN COLLEGE? FOUR CRITICAL YEARS REVISITED* 323 (1993). Nevertheless, Astin still found that attending a women's college was positively associated with numerous factors including baccalaureate completion, satisfaction with faculty and overall quality of instruction, leadership measures, writing skills, analytical and problem-solving skills and critical thinking ability. *Id.* at 324. Most of these positive effects were "directly attributable to attending a women's college" and could not "be entirely explained or accounted for on the basis of other characteristics, such as small size, residential emphasis, and private control." *Id.* at 325.

Regardless of whether the positive effects identified in these studies are due to a weakened "adolescent climate," the presence of female role models, or other factors, the studies support the view that, at least during the critical developmental years that occur in late adolescence through college, some women benefit from a single-sex education.

2. Single-Sex Education Has Been Linked With Greater Career Achievement

In addition to those studies that measure achievement through questionnaire data, performance tests, and school records, there are also studies suggesting that women graduates of single-sex colleges are more likely than their peers at coeducational institutions to have been recognized for their career achievement.

In the first of these studies, Professor Elizabeth Tidball of George Washington University Medical Center analyzed a sample of randomly-selected women cited in "Who's Who of American Women." See Tidball, *Perspective On Academic Women and Affirmative Action*, 54 EDUC. REC. 130 (1973) (hereinafter "Tidball (1973)"). She concluded that, relative to the total number of their women graduates, the women's colleges produced a higher proportion of "achievers" than did the coeducational colleges. *Id.* at 132.

Some later studies have criticized the Tidball study on the ground that a disproportionate number of the "achievers" who had graduated during the years under study (1910 through 1940) were from the highly selective Seven Sisters Colleges (Barnard, Bryn Mawr, Radcliffe, Mount Holyoke, Smith, Vassar, and Wellesley).⁵

⁵ One study, for example, has suggested that many of the women who attended these highly selective colleges would have attended the Ivy League colleges had they been open to women during the years in question. See, e.g., Oates & Williamson, *Women's Colleges and Women Achievers*, 3 SIGNS: J. WOMEN CULTURE & SOC'Y 795, 803 (1978).

Notwithstanding these criticisms, more recent studies have suggested that women's colleges may, in fact, play an important role in producing successful graduates. In one such study, Professor Tidball reanalyzed her own data and found that, relative to the total number of women graduates, "highly selective women's colleges were twice as likely to have produced achievers as were the highly selective coeducational colleges." See Tidball, *Women's Colleges and Women Achievers Revisited*, 5 SIGNS: J. WOMEN CULTURE & SOC'Y 504, 512 (1980). "Similarly, all other women's colleges were twice as likely to have produced achievers as were all other coeducational colleges." *Id.*

An even more recent study partially replicated Professor Tidball's results using data from women achievers who had graduated in more recent decades. Rice & Hemmings, *Women's Colleges and Women Achievers: An Update*, 13 SIGNS: J. WOMEN CULTURE & SOC'Y 546 (1988) (hereinafter "Rice & Hemmings"). The study's purpose, in part, was to investigate whether "the tumultuous decade of women's college closings has had an effect on the number of women achievers who have graduated from women's colleges, as compared to coeducational institutions." *Id.* at 552. Although the results were not statistically significant, the study found that in proportion to the total number of women graduates women's colleges had one and one-half as many graduates who were achievers as did the coeducational colleges during the decade of the 1970's. *Id.* at 556.⁶

The success of women's colleges in producing a high rate of women achievers has been the subject of much discussion. Professor Tidball attributed her results to the

⁶ Although some commentators have questioned whether being listed in "Who's Who of American Woman" is the most reliable measure of career success, Rice and Hemmings have observed that the publication "provides a readily available compilation of women who have achieved career accomplishments in a broad range of fields." Rice & Hemmings, 552.

prevalence of female faculty role models and mentors at women's colleges. She found that, for both single-sex and coeducational colleges, the number of "career-successful women graduates" increased as the ratio of women faculty members to women students increased. Tidball (1973), 135. Other researchers have similarly concluded that "[t]here seems little question that an environment in which many women teachers and mentors provide traditional and nontraditional examples of achievement is an advantage to young women." Rice & Hemmings, 558.⁷

The presence of female mentors and role models may not be the sole explanation for the beneficial effect of women's colleges. After conducting his own review of the literature, Professor Ashton Trice of Mary Baldwin College has recently concluded that "the best interpretation of these studies is that special advantages accumulate for women educated at *academically rigorous* women's colleges." Trice, *Advantages of the Women's College: What Research Has To Tell Us*, MARY BALDWIN MAG., April 1991, at 10, 12 (emphasis in original). In addition to the prevalence of women role models, these special advantages may include a greater attention to women's development in mathematics and science, greater opportunities to assume leadership roles, and a more relaxed atmosphere due to the absence of men. *Id.* at 13-14.

While it may be difficult to isolate the specific reasons why women's colleges have been successful in producing a high rate of women achievers, these studies indicate that women's colleges offer significant advantages over coeducational institutions.

⁷ Other types of studies support the importance of same-sex role models. One study has found that "[f]emale graduate students identifying female professors as role models viewed themselves as more career oriented, confident, and instrumental than did female students identifying male role models." See Gilbert, Gallessich & Evans, *Sex of Faculty Role Model and Students' Self Perceptions of Competency*, 9 SEX ROLES 597, 604 (1983).

B. Single-Sex Education's Role in Encouraging Women to Pursue Male-Dominated Careers

A diverse body of literature suggests that women attending single-sex schools may be even more likely than their peers at coeducational schools to pursue male-dominated careers.

Following her pioneering study on women achievers in 1973, Professor Tidball performed three additional studies to examine the baccalaureate origins of scientists and scholars, men and women entering medical school, and men and women with natural science doctorates. See Tidball & Kistiakowsky, *Baccalaureate Origins of American Scientists and Scholars*, 198 SCIENCE 645 (1976); Tidball, *Baccalaureate Origins of Entrants into American Medical Schools*, 56 J. HIGHER EDUC. 385 (1985); Tidball, *Baccalaureate Origins of Recent Natural Science Doctorates*, 57 J. HIGHER EDUC. 606 (1986). In each of these studies, Professor Tidball found that, relative to the total number of women graduates, the women's colleges produced a significantly higher proportion of graduates in these fields of study than did coeducational colleges.

In yet another study, Professor of Sociology Marvin Bressler of Princeton University and his colleague Peter Wendell explored the impact of single-sex and mixed-sex colleges on career aspirations. See Bressler & Wendell, *The Sex Composition of Selective Colleges and Gender Differences In Career Aspirations*, 51 J. HIGHER EDUC. 660 (1980). Analyzing responses to a national survey of male and female undergraduates enrolled in single-sex and coeducational colleges, the study concluded that between freshman and senior year, there was a significant increase in the number of women from single-sex colleges who intended to pursue more "masculine" vocations. *Id.* at 660. The greatest effect was found in the number of women who intended to become college professors or lawyers.⁸ *Id.* In contrast, the coeducational colleges had "no

⁸ Among the other "masculine" professions included in the study were physician, accountant, business executive, business owner, engineer, scientific researcher, and religious occupations.

appreciable demonstrable influence on the career ambitions of either sex." *Id.* at 662. Based on these results, the researchers suggested that "sexual parity in the occupational domain might be better served if larger numbers of young women were to enroll in single-sex colleges." *Id.*⁹

An even more recent study analyzing questionnaire data from college women has suggested that single-sex education along with family structure plays an important role in influencing career choice. See Rubenfield & Gilroy, *Relationship Between College Women's Occupational Interest and a Single-Sex Environment*, 40 CAREER DEV. Q. 64 (1991). The study found that college women who had attended single-sex high schools and had brothers were more likely to choose nontraditional careers compared to their peers who had attended mixed-sex high schools, regardless of sibling gender. The study suggests that, although there are numerous factors that might affect a woman's career choice, "the opportunity to interact in a single-sex environment is important at some stage of a young woman's life, if she is to develop nontraditional interests." *Id.* at 70.¹⁰

⁹ Lee and Marks similarly found that women who attended single-sex secondary schools were more likely than their peers from mixed-sex schools to consider application to law school. See Lee & Marks, 586. While not all studies have reported these significant effects on career choice, see, e.g., Stoecker & Pascarella, *Women's Colleges and Women's Career Attainments Revisited*, 62 J. HIGHER EDUC. 394 (1991), the great weight of the research is in favor of women's colleges.

¹⁰ A recent British study of secondary school students has concluded that, whether at home or at school, "increased contact" with the opposite sex has *not* led to a "breakdown in sex stereotypical attitudes but, if anything, the reverse." *Id.* at 138. See Lawrie & Brown, *Sex Stereotypes, School Subject Preferences and Career Aspirations as a Function of Single/Mixed-Sex Schooling and Presence/Absence of an Opposite Sex Sibling*, 62 BRIT. J. EDUC. PSYCHOLOGY 132 (1992). The study suggested that girls "in sexually homogeneous environments" might have "some slight advantage over their peers in more heterogenous settings." *Id.* at 138.

These studies on career choice are consistent with other studies demonstrating that women who attend single-sex colleges or high schools have less stereotypical views about gender roles than do women attending coeducational schools. Professor Lee and her colleagues have shown that women who attend single-sex high schools or single-sex colleges have less stereotypical views about the compatibility of work and motherhood, and the traditional role of men as achievers. Lee & Bryk (1986), 389; Lee & Marks, 584-85. Similarly, Professor Riordan demonstrated that women graduates of single-sex colleges and high schools hold "more liberal attitudes toward working women" and "much stronger views toward equal sex roles" than their peers at single-sex schools. See RIORDAN (1990), 110, 133-134.

Yet another body of research has indicated that single-sex education may have a positive effect on women's participation and interest in the traditionally male-dominated fields of mathematics and science.¹¹ One study, for example, concluded that single-sex high school physics classes had a "statistically significant, positive influence upon girls' interest in physics-related careers, while mixed-sex classes may have had a slight negative influence." Stowe, *Should Physics Classes Be Single Sex?*, PHYSICS TEACHER, September, 1991, at 380.

A similar study of single-sex classes in post-primary schools in Australia concluded that "students in single-sex classes indicated significantly higher gains in confidence over time than those in mixed-sex classes" and

¹¹ A substantial number of studies have shown that girls generally participate less, receive less teacher attention, and show less interest and confidence than do boys in the subjects of mathematics and science. See, e.g., AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, *HOW SCHOOLS SHORTCHANGE GIRLS* 24-30 (1992); AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, *SHORTCHANGING GIRLS, SHORTCHANGING AMERICA* 12-14 (1991); Becker, *Differential Treatment of Females and Males in Mathematics Classes* 12 J. RES. MATHEMATICS EDUC. 40 (1981).

that this confidence "significantly increased the likelihood" of "subsequent participation" in mathematics. Rowe, *Single-Sex and Mixed-Sex Classes: The Effects of Class Type on Student Achievement, Confidence and Participation in Mathematics*, 32 AUSTRALIAN J. EDUC. 180, 195-96 (1988).¹² These findings may be of critical importance given a recent study indicating that adolescents who like math and science "express stronger desires for careers as teachers, doctors and scientists" and "are more likely to aspire to careers as professionals." AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, SHORTCHANGING GIRLS, SHORTCHANGING AMERICA 15 (1991).

Viewed as a whole, these studies demonstrate that there may be a significant link between single-sex education and nontraditional career choice. If greater equality between the sexes is one of the goals of education today, single-sex schools may be a valuable tool in accomplishing this end.

C. Single-Sex Education As a Beneficial Alternative to a Coeducational Environment

The studies that demonstrate the benefits of single-sex education in terms of academic achievement, self-esteem and career choice are consistent with a related body of research indicating that some women may suffer disadvantages in a coeducational setting. This related body of research may explain, in part, why some women perform better in a single-sex setting. It also offers an additional reason why single-sex education should be preserved as an option to coeducation.

In a recently published study commissioned by the American Association of University Women, researchers

¹² Another study has similarly concluded that single-sex education, although not a sole-factor, is a "contributory factor . . . for ensuring that girls continue in mathematics and science." Jones, *Outcome of Girls' Schooling: Unravelling Some Social Differences*, 34 AUSTRALIAN J. EDUC. 153, 161 (1990).

at the Wellesley College Center for Research on Women concluded that "[t]here is clear evidence that the educational system is not meeting girls' needs." AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS 2 (1992). Although "[g]irls and boys enter school roughly equal in measured ability . . . [t]welve years later, girls have fallen behind their male classmates in key areas such as higher-level mathematics and measures of self-esteem." *Id.* Among the study's findings were that girls participate less and receive less teacher attention and encouragement than do boys, and are discouraged from pursuing careers in science. *Id.* at 28, 68-69.

Several studies have reported that women suffer similar disadvantages at the college level. See, e.g., R. HALL & B. SANDLER, THE CLASSROOM CLIMATE: A CHILLY ONE FOR WOMEN? PROJECT ON THE STATUS AND EDUCATION OF WOMEN (1982); Hall, *Classroom Climate for Women: Tip of the Iceberg*, 51 A. FOR COM. ADMIN. BULL. 64 (1985). A recent review of this literature has concluded that the women's lack of participation might be due to the "lack of female role models and gender biased classroom behavior on the part of the professors." Williams, *Is The Post-Secondary Classroom a Chilly One for Women? A Review of the Literature*, 23 CANADIAN J. HIGHER EDUC. 29, 40 (1990).

Although some studies have challenged the view that coeducational college classrooms present a "chilly climate" for women,¹³ the fact that the issue has been the subject of controversy is testimony to the need for continued experimentation on the relative values of single-sex and mixed-sex education.

¹³ See, e.g., Heller, Puff & Mills, *Assessment of the Chilly College Climate for Women*, 56 J. HIGHER EDUC. 446 (1985); Constantinople, Cornelius & Gray, *The Chilly Climate: Fact or Artifact?*, 59 J. HIGHER EDUC. 527 (1988).

II. THE CURRENT STATE OF THE LAW CASTS DOUBT ON THE CONSTITUTIONAL VALIDITY OF SINGLE-SEX EDUCATION AND THEREFORE THREATENS WOMEN'S COLLEGES

The implications for women's colleges of the Fourth Circuit's decision in this case are uncertain but potentially very troubling. Although the court of appeals purported to recognize "that single-sex education is pedagogically justifiable" (Pet. App. 17a), it nevertheless held that the school could not continue to exist as a single-sex institution unless an *identical* program for the other sex was provided.

As discussed above, a substantial body of literature demonstrates that women can benefit from a pre-professional school education that is separate from, and in some respects different from, a coeducational institution. This literature is not based on outmoded stereotypes about the "proper" roles of men and women. To the contrary, it suggests that through single-sex education women achieve enhanced performance in careers and particularly in male-dominated careers. Women should not be denied these educational benefits if men do not benefit from or choose to attend identical institutions, or if government support for identical male-only institutions is not equal to the support given women's institutions.

The decision of the court below only enhances the doubt about the legal viability of single-sex education for women engendered by this Court's decision in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). Even though the Court did not purport in that case to decide that single-sex education never can be justified, the majority's failure to acknowledge any benefits to women from single-sex education leaves uncertain the Court's willingness to consider those benefits.¹⁴ As one commenta-

¹⁴ As indicated by the discussion in the preceding sections of this brief, studies published subsequent to the decision in *Hogan* provide even more solid support for the benefits of single-sex education for women than the studies available at the time of the *Hogan* decision.

tor has stated: "Given the uncertain scope and symbolic significance of its holding, the majority's cursory evaluation of the merits of single-sex education remains troubling." Rhode, *Association and Assimilation*, 81 Nw.U.L. REV. 106, 140 (1986).

Although *amici* all are private women's colleges, the uncertain constitutional status of single-sex education threatens these institutions. Several commentators have concluded that courts probably "will reach the conclusion that government may not provide direct financial support to institutions which practice discrimination prohibited to government by constitutional standards of equality." Gallagher, *Desegregation: The Effect Of The Proposed Equal Rights Amendment On Single-Sex Colleges*, 18 ST. LOUIS.U.L.J. 41, 67 (1973). See Feldblum, Krent & Watkin, *Legal Challenges To All-Female Organizations*, 21 HARV.C.R.-C.L. L.REV. 171, 196 (1986) (hereinafter "Feldblum") (discussing strategies for suit against a government official who disbursed funds to a single-sex organization that received the funds "and discriminated on the basis of sex in that program"); Miller, *The Future Of Private Women's Colleges*, 7 HARV.WOMEN'S L.J. 153, 158-161 (1984) (hereinafter "Miller") (discussing the availability of a challenge to Title IX funding of single-sex schools). The commentators find support for this conclusion in the Supreme Court's decision in *Norwood v. Harrison*, 413 U.S. 455 (1973):

Racial discrimination in state-operated schools is barred by the Constitution and "[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Lee v. Macon County Board of Education*, 267 F. Supp. 458, 475-476 (M.D. Ala. 1967).

Id. at 465.¹⁵

¹⁵ See also *Cooper v. Aaron*, 358 U.S. 1, 19 (1958):

[S]tate support of segregated schools through any arrangement, management, funds or property cannot be squared with the

. Commentators also have postulated the threat of a cut-off of tax exemptions for private single-sex schools. "Should the Supreme Court rule as it has done with respect to race that separation by sex in education is inherently unequal, the IRS would not only be justified in denying tax exempt status to private schools with sex-restrictive admissions policies but it might well be forced to do so." Dubnoff, *Does Gender Equality Always Imply Gender Blindness? The Status Of Single-Sex Education For Women*, 86 W. VA. L. REV. 295, 310 (1984) (hereinafter "Dubnoff") (analyzing the implications of *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), for single-sex schools' tax exemptions). See also Miller, 163-165. While the Fourth Circuit's opinion in this case does not go so far as to hold that separation by sex is inherently unequal, it takes a significant step in that direction by apparently banning single-sex institutions for which a mirror image version of the institution does not exist for the other sex.

The threat of a challenge to a private single-sex college's tax-exempt status is not an idle one.¹⁶ State tax assessors sought to challenge Smith College's tax exemption on the ground that the women's college "was not entitled to an exemption because it engaged in sex discrimination in violation of Federal and State law." *Trus-*

[Fourteenth] Amendment's command that no state shall deny to any person within its jurisdiction the equal protection of the laws.

¹⁶ A 1977 IRS letter ruling concluded that a donor's limitation of scholarships to male donees "is not a bar to charitable deduction . . . [because] classification based on sex is not against declared Federal public policy and is educationally and socially beneficial to the community at large." IRS Letter Ruling (Technical Advice Memorandum) 7744007 (1977). This ruling, however, has been severely criticized as "flagrantly disregard[ing] or misconstru[ing] pertinent federal judicial and legislative pronouncements . . ." Ginsburg, *Sex Discrimination In The IRS: Public Policy and the Charitable Deduction*, 10 TAX NOTES 27 (1980).

tees of Smith College v. Bd. of Assessors, 385 Mass. 767, 768, 434 N.E. 2d 182 (1982).¹⁷

Potential direct challenges to the existence of private, single-sex colleges have been discussed by commentators as well.¹⁸ But a challenge to the funding or tax-exempt status of a women's college is itself likely to threaten the existence of the school. "Since most private colleges and universities receive financial support from the government and benefit greatly from tax exempt status, the threat of withdrawal of these privileges along with the likely ineligibility of students to receive government assistance means that these institutions must in practice comply with constitutional restrictions." Dubnoff, 298.

Currently there are approximately 56 women's colleges enrolling about 64,000 students and only eleven men's colleges enrolling about 11,000 students. Pet. App. 52a. None of these women's colleges is in a position to provide an equivalent education for men or to assure that the government equally supports identical all-male institutions. Moreover as a practical as well as a legal matter these women's colleges cannot continue to function if the legal system refuses to recognize the legitimacy

¹⁷ The Massachusetts Supreme Judicial Court did not reach the merits, as it held that the tax assessors were not vested with authority to raise the constitutional challenge.

¹⁸ See, e.g., Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 J.L. & EDUC. 171, 195, 205 (1982) (suggesting that courts may decline to enforce the decisions of educational institutions unless they conform to constitutional standards and reviewing the arguments of "numerous commentators . . . for application of equitable principles to private institutions of higher learning"); Feldblum, 199 (even though "under current doctrine most private organizations are unlikely to be found to be 'state actors,' " "creative litigation" strategies may expand cases where state action is found); Miller, 158 (noting that despite the current scope of the state action doctrine, "[c]ivil rights advocates continue to demand that private institutions adhere to basic norms of fair and equal treatment").

of the benefits of single-sex education for women. The uncertainty of the current state of the law encourages the sort of legal challenges attempted in the *Smith* case. Even if unsuccessful, such legal challenges strain the resources of private institutions. In addition, public officials may be affected in their legislative judgments by the courts' failure to affirm the constitutional validity of single-sex education for women.¹⁹

This country faces an educational crisis. Studies strongly suggest that single-sex education for women furthers the academic and career achievements of women. This country cannot afford to cut off even potentially effective educational programs. This Court should speak to uphold the constitutionality of single-sex education for women before legal uncertainty becomes a tool to eliminate those institutions.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

CAROLYN B. KUHLM *
 ANDREA M. GAUTHIER
 MUNGER, TOLLES & OLSON
 355 South Grand Avenue
 Thirty-fifth Floor
 Los Angeles, California 90071
 (213) 683-9100
Counsel for Amici Curiae

March 24, 1993

* Counsel of Record

¹⁹ The Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701, 1703(c), has been held to prohibit assignment of pupils to public single-sex schools. *United States v. Hinds County School Bd.*, 560 F.2d 619 (5th Cir. 1977).

No. 92-1213

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

VIRGINIA MILITARY INSTITUTE, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit**

**BRIEF AMICI CURIAE ON BEHALF OF
WOMEN'S WASHINGTON ISSUES NETWORK,
WOMEN FOR VMI, FRANK F. HAYDEN AND
OSCAR W. KING, III IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

Of Counsel:

ANITA K. BLAIR
WELTY & BLAIR, P.C.
2111 Wilson Boulevard
Arlington, VA 22201

MARTIKA A. PARSON
FREER & ALAGIA
Chartered

1000 Thomas Jefferson Street, N.W.
Suite 600
Washington, D.C. 20007

THEODORE B. OLSON
(Counsel of Record)

JOHN K. BUSH
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Amici Curiae

QUESTION PRESENTED

Whether the single-sex admissions policy of a state-supported college that substantially furthers important government educational interests nonetheless violates the Equal Protection Clause if the State fails to establish and operate an identical single-sex college for the other sex.

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INTEREST OF AMICI CURIAE*

Women's Washington Issues Network ("Women-WIN") is a non-profit corporation founded by women to foster interaction among, and professional development of, women and men who support the basic tenets of limited government, individual responsibility and economic rights.

Women for VMI is an unincorporated association of women who support the option of single-sex education generally and also the educational philosophy of the Virginia Military Institute ("VMI") as an important educational al-

* Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

ternative for young men. Many members of Women for VMI are personally aware of the effectiveness and value of VMI's educational program because they have sons, fathers, brothers or other family members and acquaintances who were graduated from VMI or who are presently VMI cadets.

Together, these *amici* represent more than 5,000 individuals, of whom approximately 3,200 are Virginians. More than 1,200 of these individuals were educated at single-sex colleges or secondary schools, or both, and approximately 475 were graduated from all-women's colleges in Virginia.

Frank F. Hayden is former president of the Detroit Board of Education and was the chairman of the board committee that recommended the establishment of three all-male academies, discussed *infra* pages 17-18, after studying the academic performance and disciplinary problems of urban male students. The plans for the all-male academies were abandoned as a result of a lawsuit raising a constitutional challenge identical to that brought against VMI.

Oscar W. King, III is past chairman of the board of directors of the Detroit Urban League and a graduate of Howard University and Harvard University, where he earned a masters degree in urban and land economics. He has taught at Harvard, the University of Detroit, and Wayne State University. As a concerned citizen and parent, Mr. King is a strong supporter of central city all-male academies.

Amici believe that coeducational institutions are an important element in achieving a State's education mission. But single-sex educational opportunities constitute a valuable alternative to coeducational programs, and *amici* believe that the Constitution does not require that States limit their educational menu exclusively to coeducation. Options such as single-sex education may constitutionally be tailored to respond to the distinctive needs of each sex and need not be offered on identical terms to both sexes.

Different levels of interest among males and females as well as other differences between the sexes may be considered and accommodated in designing suitable and successful educational alternatives.

Single-sex education should continue to remain eligible for the receipt of public support so that this valuable educational option may remain available for the benefit of young women and men of various means, not just those who can afford a single-sex private education without public financial assistance.

Amici are filing this brief in support of VMI's petition for writ of certiorari because the court of appeals' decision calls into question the constitutional validity of a State's support for *any* single-sex public educational program that is not provided on an identical basis to both sexes, even if a particular program is substantially related to the fulfillment of important government objectives and there is minimal interest in that particular program by members of the other sex. Because the decision below apparently requires States to provide educational assistance in precisely equivalent terms to each sex, regardless of differences in interest or need, it calls into question all direct or indirect public assistance to single-sex programs, including private schools and other governmental programs or services that may be oriented toward or provided to only one sex (*e.g.*, rape crisis centers). Unless reviewed by this Court, the decision below will stand as a formidable and discouraging barrier to efforts by States to serve the individualized needs of both women and men and to experimentation by the States with creative responses to educational and other citizen needs.

BACKGROUND STATEMENT

A. Virginia's Higher Education System

VMI is one of eighty-two colleges and universities in Virginia's outstanding system of public and private higher education. See Center For Public Service, *Virginia Statistical Abstract* 170-71 (1992). These diverse institutions

offer a "great array" of educational settings from which students may choose. See Commission On The University Of The 21st Century, *The Case For Change* 14 (1990); Pet. App. 49a. The choices range from two-year to four-year programs, liberal arts to highly specialized curricula, and include research and teaching environments, commuter and residential campuses, urban and rural settings, and opportunities for full-time and part-time students. See Pet. App. 50a; Commission On The University Of The 21st Century, *supra*, at 14; Center For Public Service, *supra*, at 170-71. Each institution in the system has its own distinctive educational mission. Taken as a whole, the system responds effectively to the demand among students for a wide variety of learning environments.

Virginia has fostered its diversity of higher educational opportunity primarily in two ways. First, the governance of Virginia's public colleges and universities is highly decentralized. The General Assembly has delegated authority to define educational objectives and admissions criteria to a board of visitors for each respective institution. Pet. App. 6a. Each board of visitors is given a high degree of autonomy. Pet. App. 18a, 49a-50a. Thus, each college and university has more flexibility to "demonstrate creativity" and "take risks" with different educational philosophies and approaches. See Commission On The University Of The 21st Century, *supra*, at 14.

Second, Virginia has promoted private higher education by providing millions of dollars in aid to students attending private colleges and universities.¹ For example, Virginia provided over \$5 million in grants to students attending the six private single-sex institutions in Virginia during

¹ Acting pursuant to explicit authorization in the Virginia Constitution, see Va. Const. art. VIII, § 11, the General Assembly has provided for loans, grants and scholarships to students attending nonprofit private colleges and universities. See Va. Code Ann. §§ 23-38.11 to -38.44:3 (Michie 1985 & Supp. 1992) (Tuition Assistance Grant Act); Va. Code Ann. §§ 23-38.45 to -38.50 (Michie 1985 & Supp. 1992) (College Scholarship Assistance Act); Va. Code Ann. §§ 23-38.53:1 to -38.53.3 (Michie 1985 & Supp. 1992) (Virginia Scholars Program).

the 1989-90 biennium. William A. DeVan, Note, *Toward a New Standard in Gender Discrimination: The Case of Virginia Military Institute*, 33 Wm. & Mary L. Rev. 489, 500 n.71 (1992). Through these grants, as well as other forms of government assistance (including student loans, scholarships, work-study programs, information resources, and technological and planning support), Virginia has recognized and encouraged the contributions of Virginia's independent colleges and universities to the breadth of the Commonwealth's higher education system. Indeed, Virginia utilizes both public and private institutions to fulfill the important governmental function of providing its citizens with access to diverse higher education programming. See Commission On The University Of The 21st Century, *supra*, at 14; Pet. App. 53a.

This case involves only one component of Virginia's diverse higher education system, and it is important to evaluate VMI's status and policies in that context. There are currently seven undergraduate institutions in Virginia that offer single-sex education, five of which are private all-women's colleges,² one of which is a private all-men's college,³ and one of which is VMI. Although the single-sex institutions have curricula⁴ and other characteristics⁵ com-

² Hollins College, Mary Baldwin College, Randolph-Macon Women's College, and Sweet Briar College, all of which offer four-year degrees, and Southern Virginia College for Women (formerly Southern Seminary College), which offers a two-year education. Pet. App. 51a.

³ Hampden-Sydney College, which offers four-year degrees. Pet. App. 51a.

⁴ All of the majors offered at VMI are also available at the four-year all-women's colleges, which have arts and science majors identical to those offered at VMI and have cooperative arrangements with other institutions for students to earn the engineering degrees available at VMI. VMI, however, does not offer many of the majors that are available at all-women's colleges (for example, degrees in biochemistry, philosophy and political science/government). See *Peterson's Guide to Four-Year Colleges* 516, 615, 756, 873 (23d ed. 1993); see also *infra* note 6.

⁵ For example, students at sixteen public coeducational institutions, as well three private all-women's colleges, may join the Army Reserve

parable to other institutions within the Commonwealth, each of the single-sex colleges has characteristics aside from its admissions policy that differentiate it from the other institutions in Virginia's higher education marketplace.⁶ Single-sex colleges therefore contribute significantly to the diversity of educational opportunities within the Commonwealth.

B. The Virginia Military Institute

VMI was founded in 1839 as the nation's first state military college. Today it retains its military character and is recognized for the contributions of its alumni to the national security. However, unlike the Nation's military service academies, VMI does not regard the training of military officers as its principal educational objective. Pet. App. 67a, 78a.⁷ Rather, VMI uses military discipline as a pedagogical tool in its unique system for the education and development of its students. Pet. App. 61a, 67a.

VMI has continuously refined and improved its educational approach since its founding. It focuses on the maturation and transition of young men from adolescence to productive careers and adult lives. VMI provides an opportunity to achieve success through discipline and hard

Officer Training Corps. See *Peterson's Guide to Four-Year Colleges*, *supra*, at 226, 615, 756, 873.

⁶ For example, Mary Baldwin is the only single-sex college offering degrees in accounting, advertising, arts administration, Asian/Oriental studies, health services administration and journalism. See *Peterson's Guide to Four-Year Colleges*, *supra*, at 615. Degrees in archeology, film studies and statistics are available only at Hollins College. See *id.*, at 516. Sweet Briar is the only single-sex institution offering degrees in ecology/environmental studies, European studies, Hispanic studies and Italian. See *id.*, at 873.

⁷ Unlike graduates of the national academies, VMI cadets are not automatically offered military commissions upon graduation. *Virginia Military Institute 1990-91 Catalogue* 12. Seventy percent of those offered commissions do accept, but only eighteen percent of the average graduating class go on to become career military officers. See DeVan, *supra*, at 536 & nn. 326, 327. Also, VMI generally attracts students who have not applied to West Point. Pet. App. 90a.

work, particularly for young men from less-advantaged economic backgrounds, for whom such an opportunity would be unattainable if VMI were not publicly supported.⁸

VMI has learned that for some young men, it is highly beneficial to be educated in a structured, physically rigorous and disciplined single-sex environment during the awkward and stressful period of adolescence. VMI accordingly developed an educational program in a military-style "adversative" environment as an effective means by which to condition the passage through adolescence to adulthood and to inculcate constructive attitudes and self-esteem.

The success of the VMI system depends on a high level of regimentation, intense physical stress, the absence of privacy and personal time, minimal opportunities for distractions from the educational mission, a focus on interdependence and bonding, and exceedingly high, uniform standards of conduct and achievement. Pet. App. 7a, 54a, 96a. The VMI educational model therefore involves rigorously egalitarian treatment of students. Pet. App. 59a, 94a. Every effort is made to subordinate physical and material distinctions among cadets. Every student must wear a uniform and live in standardized, Spartan barracks where he is subjected to the stress of constant scrutiny. Every cadet is required to attain equal levels of physical fitness and is held to identical disciplinary standards and to a strict, inflexible code of conduct that includes an uncompromising honor system.

Although the VMI system is not suitable for all young men, and does not appear to be compatible with the somewhat different developmental needs of most young women, Pet. App. 82a-83a, it has proven quite successful for many

⁸ Francis H. Smith, the first Superintendent and a cofounder of VMI, viewed VMI's mission as to provide educational opportunities to working and middle class males. Henry A. Wise, *Drawing Out the Man: The VMI Story* 13 (1978). Today, more than seventy percent of the cadet corps receives financial aid. *Peterson's Guide to Four-Year Colleges*, *supra*, at 2602. In addition, VMI places particular emphasis on the recruitment and retention of minority students. Pet. App. 87a-88a.

young men where other, more permissive, environments are not. Its "success and reputation are uncontroverted." Pet. App. 5a.

An irony of VMI's homogenized treatment of cadets is that it inspires young men to believe in a motto, inscribed in stone on the main arch at VMI, that promises that "you may be whatever you resolve to be." It creates the opportunity and incentive for a student to distinguish himself from others by developing individuality and inner strengths and abilities. VMI's uniform standards preclude cadets from privileged backgrounds from relying on social status or other advantages to achieve recognition at VMI, while permitting cadets from less advantaged or less distinguished backgrounds to prove themselves solely on their individual merit and effort.⁹

C. VMI's Status As The Only Public Single-Sex College In Virginia

The court of appeals' ruling against VMI is based largely on the fact that VMI is "unique" and the only public all-men's college in a State where there are no public all-women's colleges. VMI occupies this status, however, not because of any decision by the Commonwealth to deny single-sex education to women or any "long-standing discriminatory policy." Pet. App. 39a n.10. Rather, VMI is the only public single-sex college in Virginia because of independent, unilateral judgments by the boards of visitors at the four public formerly all-women's colleges, Pet. App. 52a,¹⁰ which converted to coeducational admissions policies, as did many institutions across the Nation, based on changing student demand and related economic factors. The transition to coeducational admission policies was also driven by the perception of some educators that publicly funded single-sex education necessarily contravenes the

⁹ VMI's distinguished alumni include Secretary of State and General George C. Marshall and United States Supreme Court Justice Thomas Campbell Clark.

¹⁰ Longwood College, Mary Washington College, Radford College, and Madison College. Pet. App. 39a, 48a-49a.

Equal Protection Clause.¹¹ As a result, the opportunities for both women and men to obtain post-secondary single-sex education assisted by public resources has dramatically diminished. There are only two public all-women's colleges remaining in the Nation today.¹²

VMI reviewed its mission and its admissions policy in light of the decisions by Virginia's public women's colleges to become coeducational and this Court's decision in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). Pet. App. 68a-69a. After a three-year study, an independent committee appointed to study these issues by VMI's Board of Visitors concluded that VMI's adversative model is highly beneficial for educating its students and that the continuation of a single-sex environment is vital to VMI's success. Pet. App. 68a-69b, 72a-74a. The VMI Board of Visitors accordingly determined not to change its unique and indisputably successful educational system. *Id.*

If VMI's admissions policy is deemed to violate the Equal Protection Clause because of the absence of an equivalent women's college that apparently is neither suitable for nor desired by substantial numbers of women, then public single-sex education will surely disappear, not just in Virginia, but throughout the Nation. But if the VMI system is upheld, any of Virginia's formerly single-sex public institutions will be free to reconsider their admissions policies at any time and to reestablish single-sex programs tailored specifically to the educational needs of young women.¹³

¹¹ See, e.g., Marcia Berman, Comment, *An Equal Protection Analysis of Public and Private All-Male Military Schools*, 1991 U. Chi. Legal F. 211.

¹² These institutions are Douglass College of Rutgers University and Texas Women's University. See Pet. App. 52a. The Citadel is the only remaining public all-men's college other than VMI. See *id.*

¹³ At Longwood College, sixty-seven percent of the student body are now women, *Peterson's Guide to Four-Year Colleges*, *supra*, at 593; Mary Washington College has sixty-five percent women's enrollment, *id.*, at 619; and sixty-three percent of the students at Radford University (formerly Radford College) are women, *id.*, at 754.

REASONS FOR GRANTING THE WRIT

A. The Court Of Appeals' Decision Suggests That A Single-Sex Educational Program Substantially Related To Important Government Objectives Must Be Provided On An Identical Basis To Both Sexes.

The decision below establishes a new and unwarranted standard for the review of educational services that are provided by the government on a single-sex basis. Gender-based distinctions in government programs should be reviewed under the intermediate scrutiny test first articulated in *Craig v. Boren*, 429 U.S. 190 (1976), and implemented to determine the constitutionality of a single-sex institution of higher learning in *Hogan*. Under this test, a public college or university can maintain a single-sex admissions policy if it "serves 'important governmental objectives' " and is " 'substantially related to the achievement of those objectives.' " *Hogan*, 458 U.S., at 724 (quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)), provided the policy is applied in a manner free of stereotypical notions of the "roles and abilities of males and females," *Hogan*, 458 U.S., at 725.

Although the court below purported to apply the same intermediate scrutiny test approved by this Court in *Hogan*, it actually imposed a separate, virtually insurmountable, standard of constitutional scrutiny. It affirmed the district court's findings that single-sex education at VMI "is justified by a legitimate and relevant institutional mission," Pet. App. 20a, and it agreed with the district court that the VMI educational model is not based upon impermissible stereotyping or overly broad generalizations, Pet. App. 14-15a. The court of appeals also affirmed the district court's findings that "VMI's unique methodology justifies a single-gender policy," Pet. App. 4a, and that "material aspects of its essentially holistic system would be substantially changed by coeducation," *id.*¹⁴ And the court of

¹⁴ Specifically, the court of appeals found adequate support in the record for the district court's findings that "at least three aspects of

appeals found adequate support in the record for the district court's conclusion that "changes necessary to accommodate coeducation [at VMI] would tear at the fabric of VMI's unique methodology." Pet. App. 14a. Thus, the court below concluded that a decision to require the admission of women to VMI "would deny those women the very opportunity they sought because the unique characteristics of VMI would be destroyed by coeducation." Pet. App. 14a.

The court of appeals nevertheless held that VMI's entirely appropriate means to an important and legitimate objective was unlawful because it was not accompanied by an identical opportunity for the excluded sex. The court held that Virginia could not overcome an Equal Protection Clause challenge, despite the legitimacy of its goal and means, unless it could justify affording "VMI's unique type of program to men and not to women." Pet. App. 5a (emphasis added). While the court used the phrase "parallel institutions or parallel programs," Pet. App. 21a, the court clearly meant that Virginia would have to afford to women VMI's "unique educational opportunity," Pet. App. 5a, that is, "an all-female program with the same mission and methodology as that of VMI." Pet. App. 17a (emphasis added).¹⁵

This requirement of an all-female institutional equivalent to VMI adds a burden not required by *Hogan*. According to the court below, the Commonwealth must offer its programs in precisely equivalent terms to both sexes or establish in some fashion that an "important policy . . . substantially supports offering" any such program to one sex but not the other. Pet. App. 21a. This standard imposes an impractical, nonsensical burden on Virginia that

VMI's program—physical training, the absence of privacy, and the adversative approach—would be materially affected by coeducation, leading to a substantial change in the egalitarian ethos that is a critical aspect of VMI's training." Pet. App. 14a.

¹⁵ See also the court's references to "the same kind of rigorous military training as . . . VMI," Pet. App. 18a, and the "unique benefit of VMI's type of education and training," *id.*

is destructive to legitimate state policies.¹⁶ And the decision below inevitably will be understood to stand for the proposition that *any* government single-gender program not provided on an identical basis to both sexes is *per se* unconstitutional.

Amici submit that the Equal Protection Clause requires only that a State provide generally comparable access for women and men to government services, and that those opportunities may be evaluated in light of the relative demands and needs of each gender for a particular service.¹⁷ The States therefore have flexibility under the Constitution to experiment with the provision of particular educational programs that accommodate the differing needs of women and men. Thus, if a single-sex program serves important government objectives, and the exclusion of one gender from a particular program is substantially related to those objectives, both of which standards are readily met by VMI, then the State should not be required to

¹⁶ Virginia already provides women the opportunity to be educated in a four-year undergraduate residential cadet program at a public institution, Virginia Polytechnic Institute ("Virginia Tech")—one of only four such programs for women in the entire Nation. Pet. App. 88a. The Virginia Tech program, however, does not appear to satisfy the court of appeals' "parallel program" requirement because, unlike VMI, Virginia Tech is not single-sex and does not employ the adversative educational model. Thus, the court of appeals' reasoning appears to mandate as a remedy the establishment of an all-women's adversative educational program identical to VMI.

¹⁷ See *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 469 (1981) ("[B]ecause the Equal Protection Clause does not demand that a statute necessarily apply equally to all persons or require things which are different in fact . . . to be treated in law as though they were the same, this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances") (citations and internal quotation marks omitted); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (upholding statute allowing women a longer period than men to earn a Navy promotion necessary to avoid mandatory discharge, because combat restrictions resulted in women having fewer opportunities to distinguish themselves professionally).

provide, or to justify not providing, an identical program to members of the excluded sex.

The decision below and the unworkable Equal Protection Clause standard that it promulgates is predicated upon three faulty premises: First, it assumed without any factual basis, and contrary to the findings in the record, that there was a demand among women for an all-women's military institute modeled after VMI sufficient to sustain a viable institution. But the record shows there is no substantial demand for an all-women's VMI. See Pet. at 13 & n.11. The record reflected a legitimate government objective in VMI's mission, a logical, rational, and non-pretextual basis for VMI's single-sex admissions policy as a means toward achieving that end, and no substantial evidence that appreciable numbers of young women in Virginia wanted a female VMI.

Second, the court below ignored the district court's finding that the differing developmental needs of women and men justify the provision of a single-sex adversative educational program to men but not to women. The VMI Board of Visitors had an ample basis for believing that the VMI adversative model would not be conducive to meeting the educational needs of women. The district court found, based upon uncontroverted expert testimony, that although women and men "have significant areas of developmental overlap, they also have differing developmental needs that are deep-seated." Pet. App. 82a. The adversative model employed at VMI is generally more effective for educating men than it is for educating most women, who tend to respond more favorably to a cooperative setting, according to the uncontroverted expert testimony. Pet. App. 83a.¹⁸

¹⁸ Although one of the government's expert witnesses testified that "the attributes of males and females in individual cases may diverge from these average tendencies [of each gender]," Pet. App. 83a (emphasis in original), the district court concluded that this testimony did not contradict the testimony of other experts that men, as a general rule, tend to benefit more from the adversative model. *Id.*

Third, the court ignored the assistance given by Virginia to women who wish to attend single-sex institutions through grants and loans to students attending the five private all-women's colleges, as well as other forms of assistance to those institutions. And Virginia's decentralized educational system accords autonomy to the board of visitors of each of its public colleges to adopt an all-women's admissions policy where demand or need exists. The Commonwealth of Virginia could reasonably have concluded that the absence of a female single-sex public college in Virginia could be remedied at any time by any of several institutions if sufficient demand for such programming were to develop.

Every educational institution will have unique characteristics. If a State must justify not providing precisely equal alternatives for women and men every time an effort is made to address the perceived needs of one gender, States will soon abandon any effort to provide for the particularized needs of its citizens, a result surely not required by the Equal Protection Clause.

B. The Court of Appeals' Decision Will Stifle Experimentation With Single-Sex Education.

The court of appeals' decision creates significant disincentives for States to offer single-sex public education, even as an impressive and growing body of scholarship has documented positive benefits from single-sex education. See Pet. App. 33a-34a, 84a.¹⁹ Several educators have advocated single-sex schools as the means to improve American education as well as to combat many of today's

¹⁹ See, e.g., Marlene A. Hamilton, *Performance Levels in Science and Other Subjects for Jamaican Adolescents Attending Single-Sex and Co-Educational High Schools*, 69 Science Educ. 535 (1985); Valerie E. Lee & Anthony S. Bryk, *Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes*, 78 J. Educ. Psychol. 381 (1986); Cornelius Riordan, *Girls and Boys in School: Together or Separate?* 146-47 (1990); Daryl G. Smith, *Women's Colleges and Coed Colleges*, 61 J. Higher Educ. 181 (1990); M. Elizabeth Tidball & Vera Kistiakowsky, *Baccalaureate Origins of American Scientists and Scholars*, 193 Science 646 (1976).

youth-related social problems. See, e.g., Joseph A. Fernandez, *Tales Out of School* 80-82 (1993); William Kilpatrick, *Why Johnny Can't Tell Right From Wrong* 236-37 (1992); Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 Harv. L. Rev. 1741, 1743-44 & n.20 (1992) (citing educators' views) [hereinafter *Inner-City Single-Sex Schools*].

For example, numerous studies have found that many students perform better in a single-sex learning environment than in a coeducational setting. See, e.g., sources cited in *supra* note 19. These studies cite gender separation as a means to alleviate social pressures that distract certain young men and women from academic achievement. See, e.g., Pet. App. 85a. Studies have found that many students neglect their studies and avoid academic achievement in order to maintain their popularity among members of the opposite sex. See, e.g., Hamilton, *supra* note 19, at 546; Carroll Atkinson & Eugene T. Maleska, *The Story of Education* 438 (1965).

Single-sex schools may also provide a better environment for fostering positive social development in many students. See, e.g., Riordan, *supra* note 19, at 133. Although some educators have promoted coeducation based upon the theory that single-sex schools are detrimental to the social adjustment of students, see, e.g., Reginald R. Dale, *Mixed or Single-Sex School?* (1969), substantial scholarship suggests that the reverse may be true for some students.²⁰

²⁰ As one scholar observed,

[i]t is commonly assumed, both by educators and by laymen, that it is "better" for boys and girls to be in school together during adolescence, if not better for their academic performance, then at least better for their social development and adjustment. . . . [But] coeducation in some high schools may be inimical to both academic achievement and social adjustment. The dichotomy forced between "life adjustment" and "academic emphasis" is a false one, for it forgets that most of the teenager's energy is not directed toward either one of these goals.

James S. Coleman, *The Adolescent Society* 50-51 (1961).

Thus, some educators have concluded that single-sex secondary schooling may be an effective means for counteracting the negative peer influences of what has long been termed the "adolescent subculture." See Coleman, *supra* note 20; Riordan, *supra* note 19, at 56-58, 138-46. And, at the college level, single-sex education has been found to enhance student assertiveness, intellectual self-esteem, interaction with faculty, career success and likelihood of obtaining a graduate degree. See, e.g., *id.* at 121, 124, 133; Smith, *supra* note 19, at 191-94; Tidball & Kistiakowsky, *supra* note 19, at 652.

Other recent studies have suggested that, for some students, coeducation may facilitate the development of stereotypical views of the roles of women and men. Cross-sex interaction may increase pressure for students to conform their behavior to traditional notions of gender roles. See Riordan, *supra* note 19, at 43-45, 56; Edward L. Vockell & Susan Lobonc, *Sex-Role Stereotyping By High School Females In Science*, 18 J. Research In Science Teaching 209 (1981). Thus, graduates from single-sex colleges may be more likely to choose a career normally associated with the other sex than students in coeducational colleges. Pet. App. 16a, 85a.

Single-sex education may be particularly valuable in a setting where discipline is stressed. For example, several educators have advocated experimentation with single-gender secondary schools to address the academic and social needs of urban youth. As one scholar recently observed,

the idea of all-male schools makes sense. The lives of inner-city youth are so much at risk . . . that radical measures are in order. And the principle behind this particular measure is a sound one. In fact, it is not especially radical. . . .

• • •

In communities with strong fathers at home and positive male role models in the neighborhood, coed schools . . . can do a decent job in educating and socializing boys. But where those

other conditions have broken down, the idea of all-male schools run by men makes sense. These might or might not be boarding schools. That would depend on the local situation. They don't have to be military schools, but—in this age of commitment to diversity—that option ought certainly to be entertained.

William Kilpatrick, *Why Johnny Can't Tell Right From Wrong*, at 234, 236 (1992).

None of these studies warrant abandoning coeducation, but they certainly justify appropriate experimentation by the States with different types of single-sex education. In fact, several school districts have sought to experiment with public single-sex educational programs on a limited basis.²¹ However, many such efforts have been impeded by charges either that public single-sex schools are *per se* unconstitutional under *Hogan*, or that, as suggested by the court below, single-sex education must be provided on a completely identical basis to both sexes, regardless of demand or need.

For example, in 1991, amicus Frank F. Hayden and other members of the Detroit Board of Education devised a proposal for three all-male academies to respond to the academic and social problems of young men, who had a dropout rate of 54%, a suspension rate of over 66%, and consistently scored lower on standardized reading and math tests and had greater disciplinary problems than young women. See *Inner-City Single-Sex Schools*, *supra*, at 1743.

²¹ A number of recent articles have reported successes in single-sex public education. See, e.g., Tom Bethell, *A Girls' School In Baltimore*, *The American Spectator*, Feb. 1993, at 17 (Laurence G. Paquin High School for Expectant Teenage Mothers); Michelle Healy, *Sisterhood Is Just the Start*, *USA Today*, Jan. 15, 1992, at 5A (all-girls Western High School in Baltimore, and Philadelphia High School For Girls); Kimberly McLarin, *All-Male Black Class Works Well In Philadelphia School*, *Richmond Times-Dispatch*, Jan. 17, 1993, at A2 (all-boys class at Stanton Elementary School); Paul Richter, *Bush Endorses All-Male Schools for Urban Blacks*, *L.A. Times*, Sept. 10, 1991, at 4A (single-sex classrooms in Detroit, New York, Baltimore, and Milwaukee).

Twelve hundred parents submitted applications for their children to be among the 536 who would be admitted to the three schools. See Ron Russell, *1,200 Want in at 3 All-Male Academies*, Detroit News, June 25, 1991, at 1A. However, operation of these academies was temporarily enjoined on the ground of alleged sex discrimination. See *Garrett v. Board of Educ.*, 775 F. Supp. 1044 (E.D. Mich. 1991) (preliminary injunction enjoining the operation of public all-boys secondary school). In response, the Detroit Board of Education reluctantly agreed to drop its proposal and settled the case, citing the cost of pursuing an appeal and the uncertainty of the outcome. See *Detroit Board of Education President Speaks On Male Academies Compromise*, PR Newswire Ass'n, Nov. 8, 1991, available on LEXIS, Nexis library, PRNews file.

The distortion of *Hogan* by the court below will add to the intimidating legal obstacles for school districts in experimenting with single-sex educational services as an option for the increasingly desperate educational needs of young people in our society. The net result will be that the single-sex education choice will be denied to lower income students and will be available only to those students who can afford a private education without public assistance.

C. The Court Of Appeals' Decision Will Have A Detrimental Effect On The Interests Of Women.

Although the decision below was ostensibly sought in order to protect the rights of women, the effect of the decision will be highly detrimental to women's interests. Single-sex higher education is considerably more popular among women than men. See Pet. App. 38a, 52a (noting that 64,000 women and 11,400 men are enrolled in single-sex colleges nationwide). See generally Anita Manning, *A '90s Resurgence For Women's Colleges*, USA Today, Feb. 16, 1993, at D1 (noting recent increased interest among women in attending single-sex colleges). Must public support for such institutions be predicated on equal efforts for men despite lesser demand, interest or need?

While it may be argued that an all-women's college should be given less equal protection scrutiny than an all-men's college because of the history of discrimination against women in higher education, the Court in *Hogan* determined that the standard of review should not vary according to the gender of the person being excluded. See *Hogan*, 458 U.S., at 723. Thus, the decision below is an unfortunate legal precedent that cannot easily be distinguished in the event that a male challenges the constitutionality of the nation's two remaining public all-women's colleges, or a currently coeducational institution that chooses to adopt an all-women's admissions policy.

In addition, for States such as Virginia that give substantial aid to private education, there is a latent but very real danger that the court of appeals' reasoning will be applied to public funding of *private* single-sex colleges. If VMI becomes coeducational as a result of the decision below, the overwhelming amount of public funding for single-sex higher education in Virginia would go to students attending all-women's colleges, which outnumber the single private all-men's college by a 5 to 1 ratio. Such disproportionate funding could make the all-women's colleges in Virginia vulnerable to constitutional challenge. Thus, the private women's colleges in Virginia have much to fear from the logic of the decision below.

Other governmental programs targeted at only one gender are also rendered constitutionally suspect by a decision that appears to require that all public services aimed at providing special assistance to women or men must be provided in precisely the same form and manner to both sexes regardless of the demand for those services. Some facilities supported by public funding (for example, shelters for battered women or rape crisis counseling centers) are normally provided exclusively for women or have institutional missions that are targeted primarily to meet women's needs. Under the reasoning of the decision below, the single-sex status of these facilities would be in jeopardy unless identical or comparable facilities were established for men. States would face the same equally unattractive

alternatives offered to Virginia by the decision below: (1) making the same facility equally available to both women and men, thereby decreasing the benefits of the facility for women; (2) establishing an equivalent facility for men irrespective of the demand or practicalities; or (3) ending operation of the facility. *See* Pet. App. 21a (listing similar alternatives for VMI).

CONCLUSION

VMI's petition for certiorari should be granted because the decision below distorts the reasoning of this Court in *Hogan* and erects potent and destructive barriers to experimentation and projects by States to respond to the individualized needs of their citizens.

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Respectfully submitted,

Of Counsel:

ANITA K. BLAIR
WELTY & BLAIR, P.C.
2111 Wilson Boulevard
Arlington, VA 22201

THEODORE B. OLSON
(Counsel of Record)
JOHN K. BUSH
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

MARTIKA A. PARSON
FREER & ALAGIA
Chartered
1000 Thomas Jefferson Street, N.W.
Suite 600
Washington, D.C. 20007

Attorneys for *Amici*

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Supreme Court of the United States

OCTOBER TERM, 1992

VIRGINIA MILITARY INSTITUTE, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITIONERS' REPLY BRIEF

RICHARD K. WILLARD

Counsel of Record

DAVID A. PRICE

STEPTOE & JOHNSON

1330 Connecticut Ave., N.W.

Washington, D.C. 20036

(202) 429-3000

GRIFFIN B. BELL

WILLIAM A. CLINEBURG, JR.

KING & SPALDING

2500 Trust Company Tower

Atlanta, Georgia 30303

ROBERT H. PATTERSON, JR.

WILLIAM G. BROADDUS

ANNE MARIE WHITTEMORE

FRANK B. ATKINSON

MCGUIRE, WOODS, BATTLE

& BOOTHE

One James Center

Richmond, Virginia 23219

*Counsel for Virginia Military
Institute, its Board of Visitors
and Superintendent, VMI
Foundation, Inc., and
VMI Alumni Association*

EDITOR'S NOTE

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Nothing could be clearer from the Government's brief in opposition ("Opp. Br.") than its objective of eliminating all remaining single-sex educational institutions and insuring that coeducation is regarded as a constitutional imperative. In its zeal to pursue this objective, the Government is willing to embrace a court of appeals decision whose rationale is artificial and unreasonable, while reserving the right to argue against that very rationale if the Court grants certiorari.

It is disheartening that the Government would seek to impose coeducational conformity on American public education at a time when the urgency of reform is almost universally recognized, and when a growing body of evidence confirms the value of single-sex education for adolescents. If the Court fails to grant certiorari in this case, the practical considerations confronting state and local governments may result in the elimination of public single-sex education as an option without the Court ever having another opportunity to consider the issue.

I. CONTRARY TO THE GOVERNMENT'S CLAIM, THE DECISION BELOW IS NOT "A STRAIGHT-FORWARD, FACT-BOUND APPLICATION" OF HOGAN

The Government's brief in opposition contends that review of the decision below is unwarranted because the decision is "a straightforward, fact-bound application" of *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). Opp. Br. at 9; see also *id.* at 19. That characterization is wrong. The decision below refers to *Hogan* just once in support of its reasoning, and then only in connection with a generic description of the intermediate scrutiny test. Pet. App. 12a. Instead, the result below was based on the panel's view that the Equal Protection Clause imposes an *additional* requirement for public single-sex education which was no part of the analysis of the Court in *Hogan*—*i.e.*, that the state must also operate an identical institution for members of the other sex. Whether the Equal Protection Clause imposes this additional requirement is the issue that the Fourth Circuit's decision presents for resolution in this Court.

Indeed, the "fact-bound" portion of the Fourth Circuit's decision was the portion in which it *accepted* the district court's conclusion that VMI's admissions policy is justified under the analysis applied in *Hogan*. The court of appeals upheld the district court's factual findings as to the benefits of single-sex education generally and at VMI and agreed that the "changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology." Pet. App. 14a. Moreover, contrary to the Government's assertion (*see* Opp. Br. at 10-11), the district court specifically found, and the appellate court agreed, that the continuation of VMI's single-sex policy was the result of "reasoned analysis" rather than stereotypes. Pet. App. 14a, 15a, 36a-37a, 74a.

Although it accepted the district court's *Hogan* analysis, the court of appeals held the continuation of VMI's single-sex program to be illegal because the Commonwealth of Virginia did not provide a VMI-type program for women. Pet. App. 21a. It is important to recognize that, although the Government attempts to defend the Fourth Circuit's ruling,¹ it does not actually agree with that court's rationale. Thus, the Government purports to "reserve the argument" that the Equal Protection Clause also forbids the establishment of an identical

¹ The Government, unlike the court of appeals, attempts to ground the "parallel program" requirement in the text of *Hogan*, relying on footnote 17. Opp. Br. at 11-12, 13 n.3. But footnote 17 simply does not address the permissibility or necessity of separate-but-equal single-sex programs, an issue that the Court had expressly distinguished earlier in its opinion. *See* 458 U.S. at 720 n.1. Footnote 17 merely rejects the idea that a single-sex program is justified whenever it provides an additional option to those who are permitted to attend, a justification that would be true in every case. Instead, the Court indicates that the provision of such an option to the benefited class must be justified by a showing that it is "substantially related to achieving a legitimate and substantial goal." *Id.* at 731 n.17. Both the district court and court of appeals found that the benefits of VMI's adversative program, which require a single-sex environment, meet this standard.

VMI-type school for women. Opp. Br. at 16 n.5. The basis for this argument, as intimated by the Government, is that "separate but equal" schools for men and women are unconstitutional. *Id.*² The Government attempts to have it both ways, defending as a "straight-forward application" of *Hogan* the Fourth Circuit's reasoning that identical programs are *required*, while simultaneously indicating that such programs are *forbidden*.

The Government's suggestion that parallel single-sex schools may be unconstitutional completely undermines its professed reason for opposing certiorari in this case. The failure to operate a corresponding VMI-type program for women in Virginia can hardly constitute a constitutional violation if the operation of separate VMI-type institutions for males and females would itself violate the Constitution. Moreover, the Government's suggestion that the validity of parallel single-sex programs is not presented at this juncture because of the availability of remedial alternatives on remand cannot withstand examination. Opp. Br. at 16-17 n.5. The question whether separate-but-equal single-sex schools are permissible under the Constitution—and, if permissible, whether they are required—is ripe for review because it arises from the Fourth Circuit's decision predicated *liability* on the absence of a VMI-type program for women in Virginia. The existence of remedial alternatives does not, and the Commonwealth's election of a remedy will not, affect resolution of this issue.³

² The Government's view coincides with that expressed by an academic critic of both VMI's position and the Fourth Circuit's decision: "The court approved a separate but equal solution that may have been good statesmanship but which rested on weak and faulty equal protection analysis." Mary M. Cheh, *An Essay on VMI and Military Service: Yes, We Do Have To Be Equal Together*, 50 Wash. & Lee L. Rev. 49, 49 (1993). The difference is that Professor Cheh, unlike the Government, acknowledges the artificial, result-oriented nature of the Fourth Circuit's reasoning. *See id.* at 55.

³ The remedial choice afforded the Commonwealth by the Fourth Circuit is but a reflection of the well-established rule that equal

II. THE DECISION BELOW CREATES AN ARTIFICIAL AND UNREASONABLE BARRIER TO THE OPERATION OF SINGLE-SEX PROGRAMS

Both the Fourth Circuit's opinion and the Government's brief speak in terms of Virginia's failure to "justify" the absence in Virginia of a VMI-type program for women. Pet. App. 5a, 17a-21a; Opp. Br. at 8, 12. This search for some further justification is more ostensible than real, however. It is clear that no justification could be proffered to satisfy the court of appeals' rigid and impractical test.

As explained in our petition, the absence of a women's VMI is amply justified by lack of demand and by the lack of benefit to women students. See Pet. at 12-13. Neither the decision below nor the Government's brief takes issue with the evidentiary support for the factual findings of the district court concerning gender-based developmental differences, which make VMI's adversative program primarily suitable for adolescent males and not females. See Pet. App. 82a-83a.⁴ Indeed, no all-women's military-style college has ever been established in the

protection violations may be remedied "by withdrawal of benefits from the favored class [or] by extension of benefits to the excluded class." *Heckler v. Matthews*, 465 U.S. 728, 740 (1984).

⁴ The existence of significant and material gender-based developmental differences was not questioned by any of the four education experts who testified below. Indeed, the Government's expert on higher education stated that "there clearly are differences between men and women, and not only obvious physiological ones, but ones having to do in part with how they interact, how they learn, and so on." Tr. 377; App. 625.

The district court emphasized that the expert testimony regarding gender-based developmental differences (and their implications for the VMI program) was corroborated by the extensive proof of West Point's experience with coeducation. Pet. App. 36a. The U.S. Military Academy modified and ultimately abandoned the adversative model following the admission of female cadets. Pet. App. 96a, 98a. Moreover, the Government's West Point witness confirmed that there are "distinctive psychological and sociological needs of women" which are "real differences, not stereotypes." Pet. App. 83a.

United States.⁵ If Virginia were to decide to operate a public women's college, it is hard to believe that the Constitution would require it to model its program after VMI. Yet, that is the burden of the Fourth Circuit's analysis.

The Government, in seeking to find support for the court of appeals' rationale, points to the district court's findings that "some women would benefit from a VMI-type education," Opp. Br. at 14 (citing Pet. App. 82a), and that "some women are capable of all of the individual actions required of VMI cadets," Opp. Br. at 14 (quoting Pet. App. 34a). But the district court's findings also make clear that college-age women who fall into these categories are rare. Pet. App. 82a.⁶ While *strict* scrutiny would require the virtually perfect means-end fit upon which the Government insists here, the empirically shown correlation between gender and the benefit of VMI's adversative method (see Pet. App. 36a, 82a-83a) easily suffices to establish the "substantial relationship" demanded by intermediate scrutiny. See *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464 (1981).

⁵ As one commentator has noted, "One would not be surprised to learn that there are no private VMI-style schools for women; the nonexistence of a market for such schools ought to tell us something about the reasonableness of VMI's admissions policy; it also suggests something about the purely symbolic nature of this lawsuit." Allan Ides, *The Curious Case of the Virginia Military Institute: An Essay on the Judicial Function*, 50 Wash. & Lee L. Rev. 35, 45-46 (1993).

⁶ The record also contains no evidence that there is any demand for an all-women's military college. The Government cites the finding that "some women, at least, would want to attend" VMI, Opp. Br. at 14 (quoting Pet. App. 38a), and refers to the fact that 347 women made inquiries to VMI over a two-year period, Opp. Br. at 2. This finding and evidence refer to demand for attending a *coeducational* VMI; they provide no support for the notion that there would be any demand for an all-women's school offering a VMI-type program. Even the demand for coeducational residential military programs is quite limited, with a total of fewer than 250 women participating nationwide. See Pet. 13 n.11.

The Government's position, like that of the court below, amounts to a *per se* requirement that a public single-sex program for one gender must always be accompanied by an identical program for the other gender, with the state having no discretion to weigh the benefits of or demand for the parallel program.⁷ The Government thus would compel the very sort of "gestures of superficial equality" that this Court has counseled against. *Rostker*, 453 U.S. at 79.

As indicated in the petition, VMI does not doubt that the Equal Protection Clause would forbid a state from operating its system of higher education in such a way that it did not offer both sexes generally comparable opportunities. See Pet. at 14. The Government erroneously asserts that this view supports the decision below. Opp. Br. at 16. In VMI's view, within the context of a system that provides generally comparable opportunities to men and women, a state is free under *Hogan* to provide certain opportunities only to one sex where, as here, the decision satisfies intermediate scrutiny.⁸ It is this critical proposition that the Fourth Circuit and the Government reject.

III. THE EQUAL PROTECTION CLAUSE DOES NOT FORBID A STATE FROM DELEGATING EDUCATIONAL POLICY TO DECENTRALIZED INSTITUTIONAL BOARDS

The Government also embraces the Fourth Circuit's theory that VMI's single-sex program is invalid based on the "lack of a state-announced policy to justify gender

⁷ Thus, for example, the Government cites with approval a district court decision holding that a high school must either operate a girls' football team or permit girls to participate in the boys' football team. See Opp. Br. at 18 n.6 (citing *Force by Force v. Pierce City R-VI School Dist.*, 570 F. Supp. 1020 (W.D. Mo. 1983)).

⁸ There is no contention in this case that Virginia's support for higher education discriminates against women overall. On the contrary, there are nearly 13,000 more women than men in Virginia's public institutions of higher education—a differential roughly ten times the size of VMI's student body. See Pet. at 14 & n.12.

classifications." Opp. Br. at 9 (quoting Pet. App. 19a). See also *id.* at 19. This, too, is a contrived rationale without foundation in this Court's jurisprudence.

Virginia law delegates the oversight of VMI to a Board of Visitors subject to control by the General Assembly. See Va. Code § 23-104, Pet. App. 105a. The district court found that the boards of visitors of Virginia's public colleges and universities have "broad autonomy in the . . . composition of [the school's] student body." Pet. App. 49a-50a. "Whether a university should be coeducational or single-sex is in every case decided by the Board of Visitors of the institution." *Id.* at 50a. Nonetheless, for some unexplained reason, the Government does not consider an articulation of state policy by the boards of visitors of Virginia's colleges and universities to count for purposes of equal protection review. Hence, the Government does not mention either the 1986 decision of the VMI Board of Visitors to retain the all-male admission policy following an extensive mission study or the district court's conclusion that the mission study represents a reasoned analysis. See Pet. at 5-6; Pet. App. 37a, 68a-74a.

As this Court has recognized, "it is self-evident that official policies can only be adopted by those legally charged with doing so." *St. Louis v. Praprotnik*, 485 U.S. 112, 125 n.2 (1985). The Government evades this proposition by focusing on a series of statements by officials or institutions having no power to set higher education policy, a function delegated by the General Assembly to the various boards of visitors. See Opp. Br. at 3, 10.⁹ Under Virginia law, as the district court

⁹ Contrary to the statements by Virginia's attorney general on which the Government relies, the Virginia governor's expression of his "personal philosophy" opposed to public single-sex education has no relevance whatsoever with respect to the higher education policy of the Commonwealth. Indeed, the governor himself advised the district court that the Virginia General Assembly, not the governor, is responsible for setting state policy applicable to college admissions. See Memorandum in Support of Motion of Defendant

noted, the VMI Board is the agency of the Commonwealth empowered to establish VMI's admissions policy, and it has done so with a clear articulation of purpose. Moreover, the General Assembly has continually authorized the expenditure of state funds to support VMI's program.

IV. THE GOVERNMENT'S BRIEF CONFIRMS THAT THE EFFECTS OF THE DECISION BELOW ARE FAR-REACHING

As noted in the petition for certiorari, the decision below has disturbing implications for public and private single-sex schools at the college level and lower levels, and for the prospects of educational innovation. The Government's efforts to minimize the effects of the decision below are unpersuasive.

Significantly, the Government does not take issue with VMI's observations as to the potential effect of the decision on private colleges and universities. *See* Pet. at 22-23. The two *amici curiae* briefs submitted by private women's colleges in this case indicate the legitimate concern of private schools as to the potential effect of the decision below.¹⁰ Governmental tuition subsidies and student loan programs, federal research grants, preferential

Lawrence Douglas Wilder to Dismiss, at 5-6; Memorandum in Support of Governor Wilder's Motion in Limine at 4 ("Whether there is a 'state interest' in VMI's admission policy is determined not by Governor Wilder's opinion, but by the General Assembly.").

The Government also cites an isolated phrase in a report of the Commission on the University in the 21st Century referring to the need for schools to "deal with faculty, staff, and students without regard to sex, race, or ethnic origin." *Id.* at 10. Nothing in the quoted report suggests that VMI's single-sex student body is inconsistent with state policy, and indeed, the report refers approvingly to the fact that the system of higher education in Virginia includes a single-sex institution. *See* Pet. App. 50a.

¹⁰ *See* Brief *Amici Curiae* of Mary Baldwin College, Saint Mary's College, and Southern Virginia College for Women (hereinafter "Three Women's Colleges Brief"); Brief *Amici Curiae* of Wells College, Randolph-Macon Woman's College, Sweet Briar College, and Hollins College.

treatment under federal and state tax laws, and ROTC programs are a few of the ways in which private single-sex schools are entangled with the public sector. *See* Three Women's Colleges Brief, *supra*, at 17-19. These entanglements may lead courts to apply the Equal Protection Clause to exclude single-sex schools from such government programs, a likelihood that the Government does not deny or even minimize.

With regard to the effect of the Fourth Circuit's decision upon single-sex primary and secondary schools, such as those considered for young men in Detroit and other urban centers, the Government's entire response is as follows: "[T]his case involves college students, not high school students. Cf. *United States v. Fordice*, 112 S. Ct. 2727, 2736 (1992) ('[A] state university system is quite different in very relevant respects from primary and secondary schools.')." Opp. Br. at 18. The Government does not indicate how primary and secondary schools are different from colleges in this context, and certainly the Government provides no indication that it would support the application of a lesser level of scrutiny to single-sex programs at the primary and secondary level.¹¹

The Government asserts that the legality of public all-women's colleges "is not likely to be resolved by further review in the instant case" because the analysis of the admissions policies at those schools would involve the issue of whether the policies served the purpose of

¹¹ The effect of equal protection doctrine on experimentation at the primary and secondary level has real consequences. In 1991, as described in the brief *amicus curiae* of Women's Washington Issues Network, Women for VMI, Frank F. Hayden, and Oscar W. King, III, the efforts of *amicus* Frank F. Hayden, and other members of the Detroit Board of Education to establish three public all-male academies—a response to "the academic and social problems of young men, who had a dropout rate of 54%, a suspension rate of over 66%, and consistently scored lower on standardized reading and math tests and had greater disciplinary problems than young women"—was thwarted by an equal protection challenge similar to the one brought against VMI. *Id.* at 17-18. *See also* Pet. at 20.

compensating for past discrimination. This Court's decision in *Hogan*, however, indicates that public women's colleges will face substantial difficulties in justifying their admissions policies based upon a remedial rationale. Of course, the compensatory rationale provides no protection for an institution that bases its single-sex policy on pedagogical rather than compensatory factors.¹²

In sum, the Government's brief serves to confirm that "it is easy to go too far with rigid rules in this area of claimed sex discrimination," and in the process "relegate ourselves to needless conformity." *Hogan*, 458 U.S. at 734-35 (Blackmun, J., dissenting).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

¹² The Government's attempt to distinguish the conflicting decisions of the Sixth Circuit, the Ninth Circuit, and the Minnesota Supreme Court are no more availing. See Pet. 16-17. The Government seeks to distinguish *Cape v. Tennessee Secondary School Athletic Ass'n*, 563 F.2d 793 (6th Cir. 1977); *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), cert. denied, 464 U.S. 818 (1983); and *Striebel v. Minnesota State High School League*, 321 N.W.2d 400 (Minn. 1982) based on the observation that those cases involved high schools rather than colleges. See Opp. Br. at 17-18. The Government's observation is accurate, but of no apparent relevance.

In addition, the Government seeks to distinguish *Clark*, which involved the exclusion of boys from an all-girl's volleyball team, based on the compensatory purpose of the team. That, too, is no distinction. In both this case and in *Clark*, the district court found an important governmental objective served by the single-sex program—here, the benefits provided by VMI's adversative program, and in *Clark*, the equalization of athletic opportunities. Both courts also found a substantial relationship between the classification and the objective. Where the Fourth Circuit parted company with the Ninth Circuit was in further requiring that VMI justify the absence of a parallel single-sex program for women, a possibility that the Ninth Circuit addressed and specifically refused to require. See *Clark*, 695 F.2d at 1131.

Respectfully submitted,

RICHARD K. WILLARD
Counsel of Record

DAVID A. PRICE
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

GRIFFIN B. BELL
WILLIAM A. CLINEBURG, JR.
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303

ROBERT H. PATTERSON, JR.
WILLIAM G. BROADDUS
ANNE MARIE WHITTEMORE
FRANK B. ATKINSON
MCGUIRE, WOODS, BATTLE
& BOOTHE

One James Center
Richmond, Virginia 23219
*Counsel for Virginia Military
Institute, its Board of Visitors
and Superintendent, VMI
Foundation, Inc., and
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SUPREME COURT OF THE UNITED STATES

VIRGINIA MILITARY INSTITUTE ET AL. v. UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 92-1213. Decided May 24, 1993

The petition for a writ of certiorari is denied.

Opinion of JUSTICE SCALIA respecting the denial of the
petition for writ of certiorari.

Whether it is constitutional for a State to have a men-only military school is an issue that should receive the attention of this Court before, rather than after, a national institution as venerable as the Virginia Military Institute is compelled to transform itself. This present petition, however, seeks our intervention before the litigation below has come to final judgment. The Court of Appeals vacated the judgment that had been entered in favor of petitioners, and remanded the case to the District Court for determination of an appropriate remedy. It expressly declined to rule on the "specific remedial course that the Commonwealth should or must follow hereafter," and suggested permissible remedies other than compelling the Virginia Military Institute to abandon its current admissions policy. *United States v. Virginia*, 976 F. 2d 890, 900 (CA4 1992).

We generally await final judgment in the lower courts before exercising our certiorari jurisdiction. See, e.g., *American Construction Co. v. Jacksonville, T & K. W. R. Co.*, 148 U. S. 372, 384 (1893); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 389 U. S. 327, 328 (1967) (*per curiam*); see generally R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* §4.18, pp. 224-226 (6th ed. 1986). I think it prudent to take that course here. Our action does not, of course,

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preclude VMI from raising the same issues in a later petition, after final judgment has been rendered. See, e.g., *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U. S. 251, 257-259 (1916); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U. S. 363, 365-366, n. 1 (1973); Stern, Gressman, & Shapiro, *supra*, § 4.18, at 226; 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4036, p. 32 (2d ed. 1988).

JUSTICE THOMAS took no part in the consideration or decision of this petition.